Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

In the Matter of: THE GINTHER TRUSTS,
A Texas Joint Venture.

FERGUS M. GINTHER,

Petitioner,

v.

THE GINTHER TRUSTS, A Texas Joint Venture;
and REDSTONE EL DORADO ACQUISITION LP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The problem in this case is that the bankruptcy court lacked subject matter jurisdiction. Petitioner challenged the bankruptcy court's assumption of subject matter jurisdiction on the grounds that a trust may not seek federal bankruptcy protection. The purported basis for jurisdiction was that the trust was actually a joint venture, which could seek such protection.

This jurisdictional claim is a flagrant example of "manufactured, convoluted federal subject matter theory," *see Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574, 587 (1999), because it is settled law that trusts may not invoke bankruptcy protection and that this trust is not a joint venture that can.

Petitioner argued lack of subject matter jurisdiction at every step of the proceeding below. He was denied his day in court on the issue, because in the first instance the courts ducked the jurisdictional issue and reached the merits instead, holding that he was not entitled to a stay of the sale of the El Dorado Ranch.

In the second instance, he was denied his day in court on the issue of subject matter jurisdiction because of rulings under the "absolute mootness" doctrine that because he had not actually *obtained* a stay of the sale, his appeal was moot. But the "absolute mootness" rule, upon which the Circuits are split, is contrary to this Court's mootness teachings. Effectual relief — namely, dismissal of the bankruptcy proceeding — could have been rendered. Thus, the prime threshold issue of subject matter jurisdiction was never reached due to reliance upon a bad rule of law.

In *Ruhrgas* this Court held that there is no hierarchy to threshold issues; that a district court has discretion to consider personal jurisdiction before subject matter jurisdiction and should generally choose the more straightforward issue. When the "absolute mootness" doctrine developed in appeals from orders authorizing the sale of assets in bankruptcy cases is applied to a record in which the application for stay raising the challenge to subject matter jurisdiction was denied without comment, the right to challenge subject matter jurisdiction unconstitutionally disappears, we contend, from the case, or becomes, in the words of the Fifth Circuit here, "irrelevant." The threshold issue of subject matter jurisdiction is thus neatly avoided at the outset by the exercise of "hypothetical jurisdiction" — contrary to *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) — and the very fact that it was avoided at the outset becomes the premise for the appearance of the second threshold issue of mootness which, as *Ruhrgas* teaches, will always prove to be more straightforwardly determinable under an "absolute mottness" rule that requires the reviewing court only to consider whether a stay was obtained.

The question presented is:

"Does the doctrine of 'absolute mootness', upon which the Circuits are split, permit covert expansion of the subject matter jurisdiction of the bankruptcy courts under the guise of procedural efficiency?"

LIST OF PARTIES

The caption of the case contains the names of parties to the appeal before The Fifth Circuit. Various other parties to the bankruptcy court's Final Judgment participated in the proceedings seeking a stay but not in the appeal. All parties to the bankruptcy court's judgment are listed in that judgment, which appears in the Appendix. (Pet. App. 38a-41a).

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1. The opinion of the United States Court of Appeals for the Fifth Circuit in No. 00-20593; *In re The Ginther Trusts, A Texas Joint Venture*, 238 F.3d 686 (5th Cir. 1/29/01), is set forth in the Appendix hereto (Pet. App. 1a).

2. The order of the United States District Court for the Southern District of Texas, Houston Division, in No. 00-1295; *Fergus M. Ginther and Adriana N. Ginther v. The Ginther Trust, A Texas Joint Venture and Redstone El Dorado Acquisition, L.P.*, dismissing the appeal as moot, entered June 27, 2000, is set forth in the Appendix hereto (Pet. App. 8a).

3. The order of the United States Court of Appeals for the Fifth Circuit in No. 00-20216; *In re The Ginther Trusts, A Texas Joint Venture*, denying the motion for stay pending appeal, entered March 22, 2000, is set forth in the Appendix hereto (Pet. App. 9a).

4. The order of the United States District Court for the Southern District of Texas, Houston Division, in No. H-00-925; *Fergus M. Ginther and Adriana N. Ginther v. The Ginther Trust, A Texas Joint Venture and Redstone El Dorado Acquisition, L.P.*, denying the motion for stay pending appeal, entered March 17, 2000, is set forth in the Appendix hereto (Pet. App. 11a).

5. The Final Judgment of the United States Bankruptcy Court, Southern District of Texas, Houston Division, in No. 98-32663-H4-11, Adversary No. 99-3058; *In re the Ginther Trusts, A Texas Joint Venture*, entered March 3, 2000, is set forth in the Appendix hereto (Pet. App. 13a).

6. The order on the motion to dismiss of the United States Bankruptcy Court, Southern District of Texas, Houston Division, in No. 98-32663-H4-11; *In re the Ginther Trusts,*

A Texas Joint Venture, entered June 24, 1998, is set forth in the Appendix hereto (Pet. App. 42a).

7. The order of United States District Court for the Southern District of Texas, Houston Division, in No. H-00-1691, *Fergus M. Ginther and Adriana N. Ginther v. Charter Title Company; NuCorp, Inc.; and Don J. Davis*, entered January 4, 2001, affirming the bankruptcy court's "Order Rescinding Order" and "Order Dispersing Funds" the is set forth in the Appendix hereto (Pet. App. 46a).

8. The order of the United States District Court for the Southern District of Texas, Houston Division, in No. MC-00-110, *Fergus M. Ginther and Adriana N. Ginther v. Charter Title Company; NuCorp, Inc.; and Don J. Davis*, denying the motion for stay pending appeal, entered April 11, 2000, is set forth in the Appendix hereto (Pet. App. 54a).

9. The Order Disbursing Funds of the United States Bankruptcy Court, Southern District of Texas, Houston Division, in No. 98-32663-H4-11, Adversary No. 99-3058; *In re the Ginther Trusts, A Texas Joint Venture*, (*Fergus M. Ginther and Adriana N. Ginther v. Charter Title Company; NuCorp, Inc.; and Don J. Davis*) entered April 10, 2000, is set forth in the Appendix hereto (Pet. App. 55a).

10. The "Order Rescinding Order" of the United States Bankruptcy Court, Southern District of Texas, Houston Division, in No. 98-32663-H4-11, Adversary No. 99-3058; *In re the Ginther Trusts, A Texas Joint Venture*, (*Fergus M. Ginther and Adriana N. Ginther v. Charter Title Company; NuCorp, Inc.; and Don J. Davis*) entered April 10, 2000, is set forth in the Appendix hereto (Pet. App. 57a).

11. The order depositing interpleader funds of the United States Bankruptcy Court, Southern District of Texas, Houston Division, in No. 98-32663-H4-11, Adversary No. 99-3058;

In re the Ginther Trusts, A Texas Joint Venture, (*Fergus M. Ginther and Adriana N. Ginther v. Charter Title Company; NuCorp, Inc.; and Don J. Davis*) entered April 10, 2000, is set forth in the Appendix hereto (Pet. App. 60a).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on January 29, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. III:

> **Section 2.** The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United State, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

11 U.S.C. § 101:

Section 101. Definitions

In this title —

(15) "entity" includes person, estate, trust, governmental unit, and United States trustee;

11 U.S.C. § 109:

Section 109. Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

11 U.S.C. § 363(m):

Section 363. Use, sale, or lease of property

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Tex. Rev. Civ. Stat. Ann. art. 6132b-2.02:

> **Art 6132b-2.02 Partnership Defined; Application to Joint Venture and Limited Partnership; Capacity as Partner; Mergers; Medical Professions**
>
> (a) Association to Carry on Business for Profit. Except as provided by Subsections (b) and (c), an association of two or more persons to carry on a business for profit as owners creates a partnership, whether the persons intend to create a partnership and whether the association is called a "partnership," " joint venture," or other name . . .
>
> (c) Person with Capacity as Partner. A Person may be a partner unless the person lacks capacity apart from this Act.

STATEMENT OF THE CASE

Petitioner Fergus M. Ginther owns a one-quarter beneficial interest in a majority (51.45%) undivided interest in a 2000 acre tract of real property, known as the El Dorado Ranch. This interest in the El Dorado Ranch had been conveyed in trust by his parents, Mr. and Mrs. N.C. Ginther, to the trustee under an express *inter vivos* trust agreement entitled the Ginther Revocable Trust Agreement.[1] N.C. Ginther had been quite

1. For all that follows concerning the issue of subject matter jurisdiction, it is important to note that the Ginther Revocable Trust Agreement provided that, after the death of the first settlor to die, the trust estate would be split into two shares, to be held and administered separately by the trustee and to be known as the deceased grantor's trust and the surviving grantor's trust. Thus, when N.C. Ginther died in 1989, trust estates known as the N.C. Ginther Trust and the Minnie Lee Ginther Trust were born. After the death of the surviving grantor, the trust estates were to be reunited under the deceased grantor's trust (Cont'd)

successful in the oil and gas business, and he and his wife accumulated a substantial estate. As part of their estate planning scheme, Mr. and Mrs. N.C. Ginther contributed the bulk of their property to several different trust estates created under various trust agreements, including the Ginther Revocable Trust Agreement. Mr. N.C. Ginther died in September 1989, and Mrs. N.C. Ginther died in July 1999.

In 1994, a group of working interest owners in certain oil and gas leases sued the executor of the Estate of N.C. Ginther, deceased, and the trustee under one of the trusts created by the Ginthers, claiming that N.C. Ginther had negligently and fraudulently failed to file certain oil and gas production reports with the Texas Railroad Commission. The suit was filed and heard in the probate court in Harris County, Texas, in the proceeding in which N.C. Ginther's will had been admitted to probate. By the time the case went to trial, a Texas chartered trust company, Advent Trust Company, having been appointed in the same probate proceeding, occupied the offices of sole successor executor and sole successor trustee under each of the trust agreements created by Mr. and Mrs. N.C. Ginther.

The jury awarded the plaintiff group $4,281,000 in damages, and, in 1997, judgment against the executor and trustee, jointly and severally, was entered on the verdict.

(Cont'd)

estate. (Pet. App. 61a-63a). It is also worthy of note that the Ginther family acquired the El Dorado Ranch, on which a golf course was developed and operated, in the early 1950's. Original ownership was 50% by Mr. and Mrs. N.C. Ginther, and 12½%, by each of their four children, including Petitioner. By the time of trial, through mesne conveyances of the various interests over the intervening 45 years, including the conveyance in trust at issue here, there were sixteen separate owners of undivided interests in the El Dorado Ranch.

The executor and trustee appealed. Pending appeal, the probate court denied their request to post alternate security and granted the plaintiffs' application for turnover of all estate and trust assets to a receiver.

In response to this state of affairs, on March 11, 1998, a Debtor styling itself the Ginther Trusts, a Texas Joint Venture, filed a petition for relief under Chapter 11 in the bankruptcy unit of the United States District Court for the Southern District of Texas. The Debtor claimed to be a *de facto* joint venture composed of Advent Trust Company, as trustee under six different trust agreements established by Mr. and Mrs. N.C. Ginther. The probate court judgment creditors moved to dismiss. On June 24, 1998, the bankruptcy court entered its order on the motion to dismiss, specifically ruling as follows:

> ORDERED, that this case shall be dismissed without further order of the Court unless Debtor, on or before June 26, 1998; (a) amends the Petition, Schedules and Statement of Financial Affairs to provide that it is a joint venture composed solely of the Noble C. Ginther Trust a/k/a/ N.C. Ginther Grantor Trust and the Minnie Lee Ginther Grantor Trust a/k/a M.L. Ginther Trust; and (b) amends its Schedules and Statement of Financial Affairs to provide that the only property of the joint venture comprising Debtor's bankruptcy estate is its interests in or relating to the Eldorado Golf Club, Inc. and the real estate known as the "El Dorado Ranch" described in Debtor's existing Schedules as "undivided interest in approximately 2,033 acres of real property located in Harris County, Texas". It is further,
>
> ORDERED, that no other property, whether listed in the Debtor's existing Schedules or

> otherwise, is property of the Debtor's bankruptcy estate or subject to the automatic stay pursuant to 11 U.S.C. § 362.

(Pet. App. 42a-43a). No party sought leave to appeal, and the Debtor filed the required amendments.

The bankruptcy case continued. The judgment creditors and several other working interest owners, whose claims against N.C. Ginther were pending in separate causes before the probate court, filed claims as unsecured creditors. In April 1999, the Debtor applied for authority to sell a large parcel, more that 1600 acres, of the El Dorado Ranch pursuant to 11 U.S.C. § 363. The application was brought as an adversary proceeding naming co-owners as defendants. Petitioner and his wife were named as defendants in the Third Amended Complaint filed in the adversary proceeding on October 14, 1999.[2]

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2. A digression here. In 1992, Petitioner, himself mired in a an involuntary Chapter 7 bankruptcy proceeding that lasted from 1982 until 1997, entrusted management of his residual assets, including any residual interest in his remaining 9.375% individual interest in the El Dorado Ranch, to his ex-business partner Davis. To hold title to the assets, they created a corporation, NuCorp, Inc., which Davis controlled. A compensation agreement controlled how recovered assets were to be distributed. In 1996, the court in Petitioner's Chapter 7 proceeding recognized the assignment and awarded the residual of Petitioner's Chapter 7 estate to NuCorp, Inc.

Davis negotiated and brokered the sale of the Ranch to Redstone and was awarded a commission in the Final Judgment. (Pet. App. 19a). After the initial contracts with Redstone were executed, Davis claimed that the commission to be paid would be all his and that the remaining proceeds from the sale of the 9.375% had been eaten up in fees and expenses charged to the corporation (mainly, as it turned out, a $10,000.00 a month management fee secretly being accrued by Davis since 1992). Accordingly, in July 1999, Petitioner filed suit for breach

(Cont'd)

Meanwhile, the probate court judgment on the $4,281,000 jury verdict was reversed and rendered by a Texas appellate court on November 30, 1999. *See Advent Trust Co. v. Hyder*, 12 S.W.3d 534 (Tex. App.-San Antonio 1999, writ denied).[3] After reversal of the judgment, the bankruptcy court was urged, but declined again, to dismiss the case, and the Debtor, deeming it expedient and in accordance with the purchaser's wishes, particularly considering the number of co-owners, proceeded to prosecute the adversary proceeding seeking authority to sell the El Dorado Ranch pursuant to 11 U.S.C. § 363.

The case was tried to the bankruptcy court on January 27 and 28, 2000. During the trial, it was conceded that the Debtor, The Ginther Trusts, a Texas Joint Venture, owned no interest of record in the El Dorado Ranch. Final Judgment authorizing the sale of the Ranch was entered March 2, 2000. (Pet. App. 13a). On March 13, 2000, Petitioner timely filed post-trial motions pursuant to Rule 52, Fed. R. Civ. P. These were denied the same day, and Petitioner filed his notice of

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(Cont'd)

of fiduciary duty in a Texas state district court in Harris County, Texas, and filed a *lis pendens* as to the 9.375% interest owned of record by NuCorp, Inc. The Debtor joined Petitioner as a defendant because of the *lis pendens* filed as to the 9.375% interest. After the sale closed, Petitioner sought to prevent Davis from receiving outright the proceeds attributable to the commission and the 9.375% interest. The course of the dispute over these proceeds in subsequent proceedings before the bankruptcy court and in the reviewing courts is detailed below.

3. The Texas appellate court had also ultimately acted (but only well after the bankruptcy petition was filed) to preserve the status quo pending appeal, thus granting effective relief from the turnover order. *See* 12 S.W.3d at 544 n.5. In hindsight, the trustee should have had faith in the Texas judicial system rather than in a convoluted theory of federal bankruptcy jurisdiction designed to wrench the case from state court.

appeal on March 15, 2000. An emergency motion to stay enforcement of the judgment was lodged in the bankruptcy court, in the district court, and in the Fifth Circuit. This motion was denied by the bankruptcy court on March 13, 2000, by the district court on March 17, 2000, (Pet. App. 11a), and by the Fifth Circuit on March 22, 2000. (Pet. App. 9a).

The sale of the 1600 acre parcel of the El Dorado Ranch to Redstone El Dorado Acquisition, LP for $10,000,000 in cash closed on March 23, 2000. The Debtor received $4,787,313.21 as net proceeds for the 51.45% owned of record by the trustee under the Ginther Revocable Trust Agreement. The trustee, who did not appear in the adversary proceeding, ratified the transaction and executed the deed, but received nothing for the conveyance of the property entrusted to it.

By order dated June 27, 2000, the district court dismissed Petitioner's appeal as moot. On January 29, 2001, the Fifth Circuit affirmed the district court's dismissal of the appeal as moot.

Immediately after the closing of the sale, Petitioner followed the dictates of the Final Judgment (Pet. App. 32a) and filed in the bankruptcy case his objection to distribution of the proceeds to certain parties, including the Debtor. Petitioner also obtained a temporary restraining order in his pending state court action against his ex-partner Davis restraining the title company from distributing the net proceeds attributable to the sale of the 9.375% interest and the amount payable as commission (together amounting to approximately $1,100,000.00) to Petitioner's ex-partner Davis or the corporation formed to hold Petitioner's assets. In advance of an injunction hearing, the title company agreed to pay these disputed funds into the registry of a court.

On March 27, 2000, the title company filed an interpleader action in the bankruptcy court, under the same cause number as the recently concluded and appealed adversary proceeding, and tendered the disputed funds into the registry of the United States District Court for the Southern District of Texas. Over objection,[4] the bankruptcy court exercised jurisdiction over the interpleader action and entered an order authorizing deposit of the disputed funds into the registry of the federal district court. Later that same day, without further notice or hearing, the bankruptcy court entered two orders rescinding its previous order and granting immediate disbursement of the funds which were the subject of the interpleader action to the ex-partner Davis and the corporation controlled by him. Petitioner appealed the last two orders as final orders disposing of the interpleader action and again sought a stay, which again was denied by the district court. After the stay was denied, the appeal was transferred to the district judge assigned to hear the appeal of the March 3, 2000 Final Judgment, and who had already heard and denied the motion to stay enforcement of that judgment. On February 28, 2001, the district court affirmed, holding that Petitioner's proper course to seek redress was through appeal of the March 3, 2000 Final Judgment, *an appeal the district court had previously dismissed as moot.* (Pet. App. 52a-53a). In so holding, the district court again did not address the threshold issue of subject matter jurisdiction of the bankruptcy court. That order has now been appealed to the Fifth Circuit.

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4. The bankruptcy unit of the district court lacked subject matter jurisdiction over this interpleader action for the additional reason that it had no effect on the debtor, its estate or the administration thereof. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 309-11 (1995). However, because Petitioner is a citizen of Missouri and Davis a citizen of Texas, the district court did have original jurisdiction of the interpleader action. 28 U.S.C. § 1335.

On January 18, 2001, the bankruptcy court entered an order on its own motion determining "that a plan must be confirmed within 120 days or this case shall be converted to Chapter 7." Petitioner continues before the bankruptcy court, seeking recovery of his equitable estate pursuant to 11 U.S.C. § 541(d), that reclamation action now and pending as an adversary proceeding, No. 00-3748, in the bankruptcy court. A liquidating plan of reorganization was confirmed over Petitioner's objections at a hearing held on April 26, 2001.

REASONS FOR GRANTING THE WRIT

Yet again, "[t]his case concerns the authority of the federal courts to adjudicate controversies." *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). This case unquestionably presents a "manufactured, convoluted federal subject matter theor[y] designed to wrench [the] case from state court." *Ruhrgas*, 526 U.S. at 587. And the issue of subject matter jurisdiction here presented squarely comports with this Court's observation "that in most instances subject matter jurisdiction will involve no arduous inquiry." *Id.* Yet this threshold issue has evaded review at each of six opportunities, despite this Court's admonition "that subject-matter delineations must be policed by the courts on their own initiative even at the highest level." *Id.* at 583.

The failure of the reviewing courts to address the issue of subject matter jurisdiction when that issue was the sole threshold issue is excused and obscured by the subsequently arising threshold issue of mootness, which arises only because the same reviewing courts failed to address subject matter jurisdiction in ruling on a motion to stay enforcement of the judgment. Something is wrong with our judicial system when review of a challenge to subject matter jurisdiction can be avoided repeatedly.

In *Ruhrgas*, the backdrop for the issue before the Court was *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). *Id.* 526 U.S. at 577. In the present case, *Ruhrgas* and *Steel Co.* together provide the backdrop for the issue presented. Does the right of a federal appellate court, articulated in *Ruhrgas*, to pick and choose threshold issues on which to deny an audience on the merits, unwittingly provide a rationale for evading the subject matter jurisdiction issue altogether, at every stage of the proceeding, even at those stages of the proceeding in which subject matter jurisdiction is the only threshold issue?

I. AN ABSOLUTE MOOTNESS DOCTRINE IN APPEALS GOVERNED BY 11 U.S.C. § 363(m) PERVERTS THE RULE IN *RUHRGAS* AND ALLOWS THE ISSUE OF SUBJECT MATTER JURISDICTION TO BE EVADED

Unquestionably, a federal court has the power to dismiss for mootness without reaching the issue of subject matter jurisdiction. *Ruhrgas*, 526 U.S. 574, 584-85. There is no absolutely dictated sequencing of jurisdictional issues. "It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585.

But in *Ruhrgas*, this Court, following *Steel Co.*, also reiterated that:

> Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case . . . Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations

> must be policed by the courts on their own initiative even at the highest level.

Ruhrgas, 526 U.S. at 583 (citing *Steel Co.*, 523 U.S. at 94-95, 101-102 (1998)).

The writ should be granted because the course of this proceeding calls for the exercise of this Court's supervisory powers: *it calls for the policing of subject matter jurisdiction at the highest level because obviously it will be policed in this case in no other way.*

There have been six opportunities for reviewing courts to pass on the "non-arduous" jurisdictional issue presented in this case. That issue is simply whether a family trust instrument, created by a husband and wife for the benefit of their children, which separates the trust *res* into two trust estates for a period of time after the death of the first of them to die, allows a bankruptcy court to avoid well recognized limitations on the Congressional grant of subject matter jurisdiction to federal bankruptcy courts and to view the trust scheme as a *de facto* joint venture business entity eligible to seek relief in bankruptcy. The issue is determined solely from construction of a trust instrument and the application of well-settled law thereto. Yet, this simple and fundamental issue has repeatedly evaded review in what is becoming almost Kafkaesque fashion.

The stage is now set for another round of orders confirming a plan of liquidation, more appeals, more applications for stays and denials thereof, and more consequent dismissals of appeals as moot. Through it all, unless this Court intervenes, the challenge to subject matter jurisdiction may never be heard. Meanwhile, the assets of a trust are being withered by administrative claims of the Debtor, the unsecured creditors committee, and the liquidation plan proponent, and by claims of "unsecured creditors", whose only claims are stale claims against the late N.C. Ginther personally.

The mechanism by which this feat has been accomplished is the "absolute mootness" doctrine developed in the Ninth Circuit, and now applied in exemplary fashion by the Fifth Circuit in this case. The "absolute mootness" rule was first articulated by the Ninth Circuit in *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172 (9th Cir. 1988) and reiterated and extended by that court in *In re Filtercorp, Inc.* 163 F.3d 570, 576 (9th Cir. 1998). The Ninth Circuit's articulation of the rule is that:

> Finality in bankruptcy has become the dominant rationale for our decisions; the trend is towards an absolute rule that requires appellants to obtain a stay before appealing a sale of assets.

The Ninth Circuit makes no secret that its "absolute mootness" rule exalts the particular need for finality in bankruptcy cases[5] over the general Article III mootness analysis, first articulated by this Court in *Mills v. Green*, 159 U.S. 651, 653 (1895) and reiterated in *Church of Scientology of California*

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5. Perhaps the most succinct statement of the policy for respecting finality in bankruptcy cases, and the role of a stay in furthering that policy, is provided by Judge Easterbrook:

> [t]he significance of an application for a stay lies in the opportunity it affords to hold things in stasis, to prevent reliance . . . while the appeal proceeds. A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization. And it is the reliance interest engendered by the plan, coupled with the difficulty of reversing critical transactions, that counsels against attempts to unwind things on appeal. Every incremental of revision on appeal puts a cloud over the plan of reorganization and derivatively over the assets of the reorganized firm.

In re UNR Industries, 20 F.3d 766, 769-70 (7th Cir. 1994).

v. United States, 506 U.S. 9, 12 (1992), which requires a court considering the question of whether an appeal is moot to determine whether it is impossible to grant the prevailing party any effectual relief whatsoever. Indeed, in *Filtercorp, Inc.* the Ninth Circuit expressly held that under its espoused "absolute mootness" rule for appeals governed by 11 U.S.C. § 363(m), the issue of whether the appellate court can fashion effective relief is immaterial. 163 F.3d at 517.

The Circuits are divided on this important issue. The Tenth Circuit, in a very well reasoned opinion citing *Mills v. Green* and *Church of Scientology*, has held that "where state law or the Bankruptcy Code provides remedies that do not affect the validity of the sale, § 363(m) does not moot the appeal". *In re Osborn*, 24 F.3d 1199, 1204 (10th Cir. 1997); *see also In re BCD Corp.*, 119 F.3d 852 (10th Cir. 1997). The Seventh Circuit in *In re Lloyd*, 37 F.3d 271, 273 (7th Cir. 1994) likewise held that inability to recover the land sold does not render the entire appeal moot where — as here — the appellant claims an interest in the proceeds.

In this case, Petitioner's claim as *cestui que* trust has been asserted continuously and is currently pending before the bankruptcy court. Petitioner wants return of his trust property either to himself through reclamation or to a proper trustee through dismissal of the case for lack of subject matter jurisdiction. Petitioner could have been given effectual relief at any stage of the proceeding by dismissal of the case for want of subject matter jurisdiction.[6]

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6. Petitioner is 64 years old, is unemployed and lives in straitened circumstances outside of Branson, Missouri. He has had recent health problems, but has no insurance. His requests for help in defraying medical expenses to his trustee have gone unanswered while hundreds of thousands of dollars in interim administrative fees have been paid (Cont'd)

The present case presents a salient example of the "absolute mootness" rule, allegedly codified in 11 U.S.C. § 363(m), being given its intended mechanical application: if a stay is not *obtained*, the case becomes automatically moot. The question of whether any effectual relief may be had is rendered immaterial; not even addressed by the reviewing court. The statutory language of 11 U.S.C. § 363(m) itself is all to the contrary of an absolute mootness rule. The statute is clear that reversal or modification on appeal of orders authorizing sales may be had even though the validity of the sale to a good faith purchaser may not be affected by such reversal or modification. The statute expressly contemplates the very appeals which the absolute mootness rule forecloses. This Court should grant the writ because the clear wording and import of 11 U.S.C. § 363(m) is being stood on its head in the developing case law.

II. *STEEL CO.* REQUIRES THAT SUBJECT MATTER JURISDICTION BE DETERMINED BEFORE THE MERITS OF THE REQUEST FOR STAY MAY BE REACHED

Petitioner's challenge to subject matter jurisdiction was certainly not moot when the district court and the Fifth Circuit ruled on his motion to stay enforcement of the judgment pending appeal. Yet neither court considered whether this entire proceeding had carried the court "beyond the bounds of authorized judicial action." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998).

(Cont'd)
from the proceeds available from the sale of the El Dorado Ranch. Dismissal would return the property to the trust, for which achievement Petitioner would be entitled to reimbursement. *See Hobbs v. McLean*, 117 U.S. 567, 582 (1886). Relief from the expenses and claims attendant to a bankruptcy proceeding itself would be, and will be, effectual relief.

A reviewing court's denial of a motion to stay without addressing the issue of subject matter jurisdiction is tantamount to an exercise of hypothetical jurisdiction. *See id.*, 523 U.S. at 101. In this case hypothetical jurisdiction appears to have produced more than a hypothetical result: the bankruptcy court's order becomes immune from any challenge.

The federal courts may not hypothesize jurisdiction to rule on the merits of a motion to stay any more than they may do so to rule on the merits of any other issue. "Without jurisdiction, the court cannot proceed at all in any cause." *Id.*, 523 U.S. at 94. Here the Congressionally proscribed limits of bankruptcy jurisdiction have been directly challenged at every stage, and yet the question of whether this entire proceeding is out of bounds has never been addressed.

It is apparent from the course of this appeal that the application for stay is the crucial step in appealing orders authorizing sales of assets under 11 U.S.C. § 363. The reviewing court's inquiry into the familiar four issues to be considered on the merits of a motion to stay in itself presupposes and depends on the existence of subject matter jurisdiction in the court from which the judgment issued. The power and duty of a court to protect its jurisdiction involves the power and duty to police its limited jurisdiction from unauthorized, expedient and consensual uses. In requesting a stay from the Fifth Circuit, on March 21, 2000, Petitioner put the issue directly to the Court:

> In sum, in the interest of justice, in the interest of all concerned, this Court should stay enforcement of the Final Judgment in this case only so long as is necessary to rule on the subject matter jurisdiction issue. It is this Court's responsibility to consider the question of subject matter jurisdiction and to dismiss the action if such jurisdiction is lacking. This Court has a responsibility to act on that issue and has the

power to do so within the context of this appeal. *See Magnolia Marine Transport v. LaPlace Towing Corp.*, 964 F. 2d 1571, 1580 (5th Cir. 1992).

Moreover:

> It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. Bank of North-America*, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936).

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).

These impatient parties will surely cooperate in a most truncated schedule to be fashioned by the Court which will allow them the opportunity to bring forward anything from the record to discharge their burden of proving that subject matter jurisdiction exists. Appellants are ready to submit the case on the basis of (1) the trust agreement itself, (2) the undisputed fact that there is only one trustee and thus there cannot be a joint venture, and (3) the undisputed and conclusively proved fact that the alleged joint venture owns no title to the Eldorado Ranch. Why cannot this case be submitted either now or within a matter of several more days by all interested parties? Then we will have it up or down to the final relief of all the parties.

In sum, in a society governed by the rule of law, the limits of the powers of courts and of parties acting in those courts need to be clearly defined and

> scrupulously observed. This Court clearly has the power and duty to act on the issue and the power to preserve the *status quo* to protect its power to so act.

Despite this plea, the Fifth Circuit denied the motion for stay without comment on March 22, 2000. (Pet. App. 9a). The sale of the El Dorado Ranch to Redstone El Dorado Acquisition LP closed the following day. From that point on, the absolute mootness rule has operated to foreclose any review of the fundamental issue of subject matter jurisdiction.

III. ABSOLUTE MOOTNESS AS APPLIED IN THIS CASE CANNOT BE SQUARED WITH VACATUR

The Court should also consider that, as applied in this case, an absolute mootness rule hopelessly conflicts with the remedy of vacatur. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 22-25 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). In this case, absolute mootness pretermitted even the issue of good faith. The disute over a 12.86% undivided interest is subject to the equitable remedy of vacatur as announced by this Court by reason of an overagressive mootness analysis. For the subject matter jurisdiction issue to be rendered "irrelevant", merits issues must be avoided at all cost.

The policy of finality which spawned the absolute mootness rule is trumped by the rule that prevents "a judgment, unreviewable for mootness, from spawning any legal consequences". *Munsingwear*, 340 U.S. at 41. The good faith purchaser, whose interest is to be protected by the policy of finality, is frustrated if the finding of good faith is subject to vacatur. The Fifth Circuit *per curiam* opinion's discussion of good faith, a sort of a sticking the foot in to test the waters in

the pool of merits issues, at best muddies the issue.[7] As the case now stands, if the Court denies this Petition, Petitioner will move to vacate the finding of good faith and the other findings in the judgment in the bankruptcy court. This motion will be denied. The bankruptcy court has already announced its conclusion that all issues are *res judicata* by virtue of the Fifth Circuit's "affirmation" of the judgment. This case could be back, the jurisdictional issue still unresolved. "Denial of a motion to vacate could bring the case here. Our supervisory power over the judgments of the lower federal courts is a broad one." *Munsingwear*, 340 U.S. at 40.

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7. The Fifth Circuit observed that "Appellants challenged the Venture's record title to the Ranch. . . .". (Pet. App. 4a). Actually, the seller's lack of title was conceded at trial. This, of course, was the dispositive fact on the issue of good faith. Protecting good faith purchasers by providing notice is the very reason we have developed throughout the land the systematic apparatus for the recordation of deeds of real property. *See Brush v. Ware*, 40 U.S. 93, 110-114 (1841); *see also Anthony v. Butler*, 38 U.S. 423, 434 (1839) (object of recording act is to give notice to subsequent purchasers.) It is impossible under this system for a purchaser of real estate to be in good faith when he knows his seller does not own the property. Redstone had notice of Petitioner's claim and therefore was not in the predicament of a good faith purchaser for value *without notice. See Brush v. Ware, id.*; *see also Oliver v. Piatt*, 44 U.S. 333, 401 (1839). The Fifth Circuit's treatment of the bankruptcy court's express finding of good faith as an "argument" or "claim" which Petitioner allegedly failed to raise in the bankruptcy court could be argued to be a ruling on the merits. However, in the final analysis, perhaps even mindful of the need to avoid all merits issues in order to render jurisdiction "irrelevant," the Court of Appeals simply declared: "we need not address the issue", and then indicated *what it would likely do* if it were to reach the good faith issue. (Pet. App. 5a).

IV. THERE ARE TWO OBVIOUS SOLUTIONS TO THE PROBLEM

Procedurally, this case presents the compelling situation where a stay of the bankruptcy court's orders was timely sought in the bankruptcy court, the district court and the Fifth Circuit. In each instance, Petitioner challenged subject matter jurisdiction, and in each instance the application for stay was denied without the court expressly ruling on the issue of subject matter jurisdiction. Thereafter, the appeal itself was dismissed as moot by the district court and the Fifth Circuit, each court again declining to reach the issue of subject matter jurisdiction, the Fifth Circuit ultimately finding the issue "irrelevant."[8] Another round of orders which finally disposed of the interpleader action were then appealed. A stay again was denied without comment, and the orders affirmed by the district court on the basis that Petitioner should have sought redress in the appeal already dismissed as moot. And, as stated above, the

8. It is particularly bitter to consider the Fifth Circuit's reliance on *In re Sax*, 796 F.2d 994 (7th Cir. 1986) in holding that mootness rendered the challenge to subject matter jurisdiction irrelevant. In *Sax*, the appellant failed to seek or obtain a stay. The Seventh Circuit held:

> Despite the maxim that "subject matter jurisdiction can be raised at any time," *valid procedural rules cannot be ignored* just because the jurisdictional decision is being challenged rather than the decision on the merits. *To accept Three Rivers' argument would be to ignore valid procedural requirements.*

796 F.2d at 998. (Emphasis added).

Unlike the appellant in *Sax*, Petitioner in this case diligently pursued review of the subject matter jurisdictional issue *in advance* of the sale. Diligent attention to procedural rules prevented the maturation of reliance interests and obviated the need to respect finality at the stage where Petitioner sought to stay enforcement of the judgment both in the district court and in the Court of Appeals.

stage is set for another round in connection with the anticipated order from the bankruptcy court announced in court last Thursday, April 26, 2001, confirming a plan of liquidation. Yet through it all, *the issue of subject matter jurisdiction has never been addressed.*

There are two ways out of this dilemma. In dismissing this appeal as moot, the Court of Appeals never addressed Petitioner's argument that dismissal of the case for want of subject matter jurisdiction would grant effectual relief to Petitioner because he claimed an interest in the proceeds. Rather, the Court of Appeals simply held that because Petitioner failed to obtain a stay of the order authorizing the Ranch sale and because the sale occurred pending the appeal of the order to the district court, the district court properly dismissed the appeal as moot. Petitioner submits that traditional mootness analysis still applies to appeals of such orders and that this Court should act to foreclose advance of an "absolute mootness" rule, which appears to be gaining momentum in the overburdened courts, as reflected in this decision from the Fifth Circuit and in previous decisions from the Ninth Circuit.

Alternatively, following *Steel Co.*, this Court should hold that in bankruptcy cases, in which the motion to stay has assumed such central importance, the issue of subject matter jurisdiction must be addressed prior to ruling on the merits of the motion to stay. Whatever the range of powers which may be exercised by a court without first passing on subject matter jurisdiction, denial of a motion to stay enforcement of a judgment authorizing the sale of assets in bankruptcy should not be included.

V. THIS COURT IS CALLED UPON TO POLICE THE CRIME OF A "DRIVE-BY" JURISDICTIONAL RULING

The Fifth Circuit, after holding that the issue of subject matter jurisdiction was "irrelevant," let it be known that:

> Moreover, we are persuaded, as was the bankruptcy court, that the Venture's resulting co-ownerships following the division of the original trust on the death of the first settlor to die is [sic] a de facto joint venture under Tex. Civ. Code [sic] Ann. § [sic] 6132b.

(Pet. App. 6a-7a).

This is a lovely example of a "drive-by jurisdictional ruling"[9] in a *per curiam* disposition, which this Court has indicated it will view "with its customary skepticism."[10] In fact, the statement is obviously nonsensical, at best a tautology. The resulting ownership by the venture is a venture. Already this meaningless dicta has prejudiced Petitioner in the continuing proceedings in the bankruptcy court. Its almost as if this statement was thrown out gratuitously *with the knowledge that the case was not moot.*

Throughout the entire course of this proceeding, all the parties and, one assumes, all the reviewing courts have accepted the principle that Congress has withheld federal bankruptcy court jurisdiction over estates and trusts. This has always been the case with the purely statutory bankruptcy

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9. *See Steel Co.*, 523 U.S. at 101.

10. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994).

jurisdiction. *See, e.g., Adams v. Terrell*, 4 Fed. 796, 801-02 (C.C.W.D. Tex. 1880). This understanding motivated the concoction of the joint venture theory.

In decisions under the current Bankruptcy Code, many courts have pointed to the specific legislative history[11] of 11 U.S.C. § 109 and concluded that "this legislative history, if not the express words of the statute, indicate that 'the definition [of "person"] does not include an estate or trust.' " *In re Sanders*, 91 B.R. 317, 321 (Bankr. E.D. Penn. 1988); *see also, e.g., In re Goerg*, 844 F.2d 1562, 1566 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989); *Matter of 299 Jack-Hemp Associates*, 20 B.R. 412, 413 (Bankr. S.D.N.Y. 1982); *In re Cahill*, 15 B.R. 639, 640 (Bankr. E.D. Penn. 1981); *In re Old Second National Bank of Aurora*, 7 B.R. 37 (Bankr. N.D. Ill. 1980); *In re Cohen*, 4 B.R. 201, 201-05 (Bankr. S.D. Fla. 1980). Some of these courts also focused on the definition of entity in 11 U.S.C. § 101(15) as reinforcement for the conclusion that estates and trusts are not "persons" entitled to seek relief.[12]

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11. H. Rep. No. 595 95th Cong. 1st Sess. 313 (1997); and S. Rep. No. 989, 95th Cong., 2nd Sess. 25 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5811, 6270.

12. Other courts, on various grounds, have distinguished family, testamentary, personal and spendthrift trusts from business trusts, or so called "Massachusetts Trusts", over which Congress has expressly bestowed federal bankruptcy jurisdiction, e.g. *See e.g., Cantor v. Wilbraham and Monson Academy*, 609 F.2d 32, 33 (1st Cir. 1979); *Associated Cemetery Management, Inc. v. Barnes*, 268 F.2d 97, 101-102 (8th Cir. 1959); *Pope & Cottle Co. v. Fairbanks Realty Trust*, 124 F.2d 132, 135 (1st Cir. 1941); *In re Action Roofing & Supply Co.*, 137 B.R. 217, 219 (Bankr. S.D. Tex. 1991); *In re Margaret E. DeHoff Trust*, 114 B.R. 189, 191 (Bankr. W.D. Mo. 1990); *In re Johnson*, 82 B.R. (Cont'd)

Let's finally face it — here at the highest level — the emperor has no clothes! As noted at the outset, the trust instrument at issue provided that the corpus of the trust was to be split into two shares after the first of the couple died, to be separately held and administrated by the trustee until the death of the survivor, when the two shares were to be reunited. (Pet. App. 61a-63a). This feature of the trust instrument cannot and does not convert this express trust relationship into a *de facto* partnership or joint venture business entity under Texas or any other law.

This instrument cannot be read to reveal an *intent* to create a trust relationship over property for only so long as the husband and wife were living which then converts to a partnership business entity to be managed by the trustee during the survivor's remaining life, then only to convert once again into a trust relationship after the survivor's death. In reality, the share splitting feature of the trust instrument is simply a very common feature of marital living trusts drafted in community property states such as Texas. It is also consistent with the general tax motivated features of the trust instrument.

(Cont'd)
618,619 (Bankr. S.D. Fla. 1988); *In re Walker*, 79 B.R. 59, 61-62 (Bankr. M.D. Fla. 1987); *In re L&V Realty Trust*, 61 B.R. 423, 424-25 (Bankr. D. Mass. 1986); *In re Armstead and Margaret Wayson Trust*, 29 B.R. 58, 59 (Bankr. D. Md. 1982).

Several courts have also focused on the fundamental legal proposition that an ordinary trust is not a legal entity and has no legal existence separate and apart from the trustee. *E.g.*, *In re Associated Cemetery Management, Inc., Employers Profit Sharing Trust*, 170 F. Supp. 298, 302 (W.D. Missouri 1958), *aff'd sub nom. Associated Cemetery Management, Inc. v. Barnes*, 268 F.2d 97 (8th Cir. 1959); *In re Armstead and Margaret Wayson Trust*, 29 B.R. 58, 59 (Bankr. D. Md. 1982).

Even so, under Texas law, a partnership is an association of two or more persons to carry on a business for profit. Each of these persons must have legal capacity. Tex. Rev. Civ. Stat. Ann. art. 6132b – 2.02(a) and (c). Shares of a trust estate, even though given names, are not legal entities, and are not persons with capacity to enter into partnerships in the eyes of the law. *See In re Associated Cemetery Management, Inc., Employers Profit Sharing Trust*, 170 F. Supp. 298, 302 (W.D. Missouri 1958), *aff'd sub nom., Associated Cemetery Management, Inc. v. Barnes*, 268 F.2d 97 (8th Cir. 1959). ("Although the trust instrument here creates a resulting 'entity' under which the Trustees are to maintain the trust . . . it is transparent from all other provisions thereof that such entity . . . has no legal existence separate and apart from the trustee".) The separation of the shares were mere bookkeeping entries. As managing agent of the joint venture, from which two principals does the sole trustee take direction? The only person to be found here is the trustee, and, at all times material, there has been only one trustee. Clearly, this *de facto* joint venture theory is nothing but a manufactured, convoluted federal subject matter theory designed to create the mere appearance of jurisdiction where none in fact exists in order to wrench the case from state court at a strategic and desperate moment and then later to use the procedures and perceived protections of the bankruptcy court to sell the property.

One case bears particular attention because of its similarities with the instant case. *Matter of 299 Jack-Hemp Associates*, 20 B.R. 412 (Bankr. S.D.N.Y. 1982). In that case, co-executors of a decedent's estate, faced with a foreclosure action by the mortgagee on real property, formed a partnership on the eve of filing. The bankruptcy court gave this scheme short shrift:

> This court therefore holds that where its process has been utilized by a specially created entity which only the day before was barred from access to this court

> and where nothing can be achieved by recourse to that process, the attempt to do so can only be characterized as disingenuous in the last degree. More need not be shown to afford this court the cause to dismiss with prejudice.

20 B.R. at 413.

In the case at bar, there aren't even co-fiduciaries present to form the venture. As said at the outset, this subject matter jurisdiction issue involves no "arduous inquiry".

CONCLUSION

El Dorado is gone; Poe's gallant knight will ever ride in vain. But the proceeds remain, the purchaser's good faith is unresolved, and the case continues. This appeal is not moot, and this case must be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JANUARY 29, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-20593
(Summary Calendar)

In the Matter of: THE GINTHER TRUSTS,
A Texas Joint Venture,

Debtor,

FERGUS M. GINTHER; ADRIANA N. GINTHER

Appellants,

versus

THE GINTHER TRUSTS, A Texas Joint Venture;
REDSTONE EL DORADO ACQUISITION, L.P.,

Appellees,

Appeal from the United States District
Court for the Southern District of Texas

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

Appendix A

PER CURIAM:

Appellants Fergus and Adriana Ginther contend that the District Court erred in dismissing as moot their appeal of the bankruptcy court's authorization of the sale of the undivided interest of the Ginther Trusts, a Texas joint venture ("the Venture"), in the El Dorado Ranch ("the Ranch") to Redstone El Dorado Acquisition, L.P. ("Redstone"). The Venture owned, in the aggregate, approximately 51% of the undivided interest in the Ranch, a real estate development in Texas, and joined all other owners of fractional interests in selling the Ranch to Redstone. As the Venture was then a debtor in bankruptcy, it did not sell its fractional interest in the Ranch until after it obtained authorization from the bankruptcy court pursuant to 11 U.S.C. § 363(b). Appellants contended in bankruptcy court that the sale should not have been authorized because, *inter alia*, the Venture lacked standing to become a debtor in bankruptcy. Appellants also asserted — for the first time on appeal to the district court — that Redstone was not a good faith purchaser. Because, however, (1) the sale was authorized by the bankruptcy court, and (2) Appellants were unable to obtain a stay of the sale, we affirm the district court's dismissal of this appeal as moot.

I. *Facts and Proceedings*

In the 1950s, Noble C. and Minnie Lee Ginther, husband and wife, acquired the Ranch, a 2033 acre tract of Texas real property. Thereafter, it was developed into the el Dorado Ranch and El Dorado Country Club. They sold factional interests in the Ranch, retaining approximately 51 percent in undivided ownership.

Appendix A

In the mid-1980s, the Ginthers ("grantors") created the Ginther Revocable Trust, a revocable *inter vivos* trust, to which they transferred their interest in the Ranch. The trust agreement provided that, on the death of the first grantor to die, the trustee would divide the assets of the trust into two separate shares, not necessarily equal in value, one share to hold the property of the surviving grantor, the other share to hold the property of the deceased grantor.

In accordance with that provision of the trust agreement, on the death of Noble C. Ginther in 1989, the trust's 51 percent interest in the Ranch was divided into two separate shares: The decedent's undivided 24.7 percent interest went into the Noble C. Ginther Grantor Trust and the survivor's undivided 26.7 percent interest went to the Minnie Lee Ginther Grantor Trust. These trust shares — actually sub trusts — were then placed under the fiduciary control of the Advent Trust Company, as successor trustee of the two grantor trusts that resulted (collectively the "Ginther Trusts").

In 1998, the Venture, referring to itself as a Texas joint venture, voluntarily filed for relief under Chapter 11 of the bankruptcy code. In response to a challenge mounted by a number of creditors to the Venture's standing to file for bankruptcy, the bankruptcy court found that the Venture constituted a de facto joint venture under Texas law, that it owned a fractional interest of some 51% to 53% in the Ranch, and that it did have standing as a debtor in bankruptcy court.

The Venture and the other owners of the Ranch entered into an agreement to sell the Ranch to Redstone, subject to the Venture's obtaining the bankruptcy court's approval of

the sale of its interests. Appellants challenged the Venture's record title to the Ranch and attempted to block the sale. They did not, however, challenge Redstone's status as a good faith purchaser until they appealed to the district court.

The bankruptcy court proceeded to approve the Venture's sale of its interest in the Ranch to Redstone as good faith purchaser. Appellants appealed that decision to the district court and then to us, and they sought a stay of the sale pending each appeal. Like the bankruptcy court, however, the district court — and ultimately this court — refused to grant a stay and the sale of the Ranch to Redstone was consummated.

Despite their failure to obtain a stay of the sale, Appellants prosecuted their appeal of the bankruptcy court's authorization of the sale to the district court, which dismissed their appeal as moot because the sale had already been closed. That dismissal is now before us on appeal.

II. *Analysis*

A. Standard of Review

We review *de novo* the district court's dismissal of an appeal from the bankruptcy court as moot.[1]

B. Failure to Obtain a Stay

After the bankruptcy court authorized the sale of the Venture's interest in the Ranch to Redstone pursuant to

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1. *In re GWI PCS 1 Inc.*, 230 F.3d 788, 800 (5th Cir. 2000).

11 U.S.C. § 363(b), Appellants were unsuccessful in their attempts to obtain a stay of the sale, and it closed. 11 U.S.C. § 363(m) provides that a bankruptcy court's authorization of the sale of property under 11 U.S.C. § 363(b) "to an entity that purchased . . . such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal" cannot be reversed or modified.[2]

Appellants contended, for the first time on appeal to the district court, that Redstone was not a good faith purchaser of the Ranch, making § 363(m) inapplicable. As Redstone's status as a good faith purchaser was not challenged in the bankruptcy court, however, we need not address this issue. "It is well established that we do not consider arguments or claims not presented to the bankruptcy court."[3] We nevertheless note in passing that our thorough review of the record, Appellants' arguments, and the bankruptcy court's well-reasoned opinion, convinces us that if we were to address the good faith purchaser issue we would likely agree with the bankruptcy court's determination that Redstone was a good faith purchaser as a matter of law.

C. Subject Matter Jurisdiction

Appellants also challenge the subject matter jurisdiction of the bankruptcy court by urging that the Venture was not a

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2. 11 U.S.C. § 363(m) (West 2000).

3. *Gilchrist v. Westcott*, (*In Matter of Gilchrist*), 891 F.2d 559, 561 (5th Cir. 1990) (citing *Moody v. Empire Life Ins. Co.* (*In re Moody*), 849 F.2d 902, 905 (5th Cir.), *cert. denied*, 488 U.S. 967 (1988)).

debtor with standing in bankruptcy court. This contention is irrelevant to the instant inquiry, however. In *In re Gilchrist*,[4] we adopted the Seventh Circuit's interpretation of § 363(m) that a failure to obtain a stay is fatal to a challenge of a bankruptcy court's authorization of the sale of property, notwithstanding any questions as to that court's jurisdiction. As the Seventh Circuit had earlier held in *In re Sax*,[5]

> [t]he appellants raise the jurisdictional argument as if it somehow negates or excuses their failure to obtain a stay. It does not. This appeal is moot because [the appellants] failed to obtain a stay, so we cannot reach the question of whether the bankruptcy court had jurisdiction to order and approve the sale . . . . The bankruptcy court made the determination that it had jurisdiction; an issue which it had jurisdiction to decide. . . . That decision stands unless it is appealed properly. . . . Despite the maxim that ['subject matter jurisdiction can be raised at any time,' valid procedural rules cannot be ignored just because the jurisdictional decision is being challenged rather than the decision on the merits.[6]

Moreover, we are persuaded, as was the bankruptcy court, that the Venture's resulting co-ownerships following the

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4. 891 F.2d 559 (5th Cir. 1990).

5. 796 F.2d 994 (7th Cir. 1986).

6. *Id.* at 561 (quoting *In re Sax*, 796 F.2d at 998).

division of the original trust on the death of the first settlor to die is a de facto joint venture under Tex. Civ. Code Ann. § 6132b. Such joint ventures are clearly "persons" entitled to be debtors in bankruptcy court.[7]

III. *Conclusion*

Because Appellants failed to obtain a stay of the sale of the Venture's interest in the Ranch to Redstone, the district court dismissed Appellant's appeal as moot. The decision of the district court is therefore

AFFIRMED.

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7. 11 U.S.C. § 109(b) (West 2000).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DISMISSING THE APPEAL AS MOOT DATED AND ENTERED JUNE 27, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 00-1295

FERGUS M. GINTHER and ADRIANA N. GINTHER,

Appellants,

versus

THE GINTHER TRUST, A TEXAS JOINT VENTURE and REDSTONE EL DORADO ACQUISITION, L.P.,

Appellees.

ORDER

IT IS HEREBY ORDERED that Appellees' Motion to Dismiss Appeal (Instrument No. 11) is **GRANTED**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 27th day of June, 2000, at Houston, Texas.

s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING MOTION FOR STAY PENDING APPEAL DATED AND FILED MARCH 22, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20216

In The Matter Of: GINTHER TRUSTS,
a Texas Joint Venture

Debtor

FERGUS M. GINTHER; ADRIANA N. GINTHER

Appellants

v.

THE GINTHER TRUSTS, a Texas Joint Venture; CREDITORS COMMITTEE, The Official Committee of Unsecured Creditors; REDSTONE EL DORADO ACQUISITION LP; TEBEAR INVESTMENTS INC; NUCORP INC

Appellees

CA-00-925

Appeal from the United States District Court for the
Southern District of Texas, Houston

Appendix C

Before HIGGINBOTHAM, DeMOSS, and STEWART, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for stay pending appeal is DENIED.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DENYING MOTION FOR STAY PENDING APPEAL DATED MARCH 17, 2000

COURTROOM MINUTES

JUDGE Vanessa D. Gilmore PRESIDING

COURTROOM CLERK B. E. Mares

COURT REPORTER Bruce Slavin

LAW CLERK Sorcha Landau

MORNING SESSION 10:30, 12:18

* * *

DATE: 3-17-00

CA H-00-925

Fergus Ginther et al

V.

The Ginther Trusts

Appendix D

DOCKET ENTRY

(VG) Motion Hearing (Rptr — B. Slavin)
(Proceeding)

* * *

Movant's Motion to Stay Pending Appeal is DENIED for reasons as stated on the record.

APPENDIX E — FINAL JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED MARCH 1, 2000 AND ENTERED MARCH 2, 2000

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 98-32663-H4-11
(Chapter 11)

IN RE
THE GINTHER TRUSTS,
A TEXAS JOINT VENTURE

Debtor

ADVERSARY NO. 99-3058

THE GINTHER TRUSTS,
A TEXAS JOINT VENTURE

Plaintiff

V.

NOBLE C. GINTHER, JR., ET AL.

Defendants

* * *

Appendix E

FINAL JUDGMENT

On January 27, 2000, trial was held on 1) the Complaint filed by the Debtor, The Ginther Trusts, a Texas Joint Venture, against Noble C. Ginther, Jr.; Stuart Douglas Ferrell; Stuart Douglas Ferrell, Trustee; Noble C. Ginther, III, Trustee for the Fallon Renee Ginther Trust; Noble C. Ginther, III, Trustee for the Chelsea Leigh Ginther Trust; Esther Duff, Executor of the Estate of Gordon A. Duff; Esther Duff, Successor Trustee; Mercantile Bank of Southern Illinois, Successor Trustee of the Wife's Trust and the Residuary Trust Under the Last Will dated October 6, 1987 of Gordon A. Duff; Edmond Lee "Pat" Ginther; Barbara A. Ginther Nelson; John N. Randall; Rosanne Van Dorn Ginther; Marilyn Deshong; Nucorp, Inc.; Bobbie Bayless, Receiver; Advent Trust Company, Successor Corporate Trustee of the NCG Trust; Advent Trust Company, Successor Corporate Trustee of the Noble C. Ginther Trust, and the Minnie L. Ginther Trust; Tri-Texas Realty, Inc.; Ferrell Realty Corp.; Fergus M. Ginther; Adriana Ginther; Erin Lee Ginther; and Stone Mountain Petroleum, LLC (the "Defendants"); and 2) Debtor's Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363. The Debtor appeared by and through its authorized representative and through counsel. The Defendant Nucorp, Inc. appeared by and through its authorized representative and through counsel. The Defendants Noble C. Ginther, Jr., Fergus M. Ginther, and Adriana Ginther appeared through counsel. The Official Committee of Unsecured Creditors and Amber Ginther intervened in this proceeding and appeared through counsel. Bobbie Bayless, Receiver of the Estate of Noble C. Ginther,

Sr., Deceased, having no affirmative opposition to the sale, at the request of her counsel was given permission by the Court not to attend the trial. In addition, Tebear Investments, Inc., appeared by and through its counsel of record. Redstone Properties, LLC ("Redstone Properties") and Redstone El Dorado Acquisition L.P. ("Redstone Acquisition") appeared by and through their authorized representative and through counsel. After consideration of all evidence, objections, pleadings, memoranda and arguments of counsel, the Court makes the following findings of fact and conclusions of law and enters this Final Judgment accordingly. To the extent that any findings of fact are deemed to be conclusions of law, they are hereby adopted as such. To the extent that any conclusion of law are deemed to be findings of fact, they are hereby adopted as such:

1. On March 11, 1998, the Debtor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, 11. U.S.C. § 101, et seq. (the "Code"). Since the Petition Date, the Debtor has continued to operate its affairs as a debtor in possession pursuant to sections 1107 and 1108 of the Code.

2. As reflected by this Court's Order On Motion to Dismiss, entered June 24, 1998, the Debtor is a de facto joint venture composed solely of the Noble C. Ginther Grantor Trust a/k/a N.C. Ginther Grantor Trust, and the Minnie Lee Ginther Grantor Trust, a/k/a M.L. Ginther Grantor Trust (such trusts herein being collectively called the "Grantor Trusts"). The only property of the joint venture comprising Debtor's bankruptcy estate is its ownership interests contributed by the Grantor Trusts

in or relating to the El Dorado Golf Club, Inc., d/b/a El Dorado Country Club ("EDCCI") and the real estate known as the El Dorado Ranch (the "Ranch") (together with certain personal property and certain claims and causes of action, including but not limited to avoidance actions). The Ranch consists of approximately 2,011 acres of developed and undeveloped real property located in Harris County, Texas.

3. Advent Trust Company, as Successor Trustee of the Noble C. Ginther Grantor Trust a/k/a N.C. Ginther Grantor Trust, owns, of record, a 24.7246639656902765% undivided interest in the surface estate of the Ranch. Advent Trust Company, as Successor Trustee of the Minnie Lee Ginther Grantor Trust a/k/a M.L. Ginther Grantor Trust, owns, of record, a 26.7246639656902765% undivided interest in the surface estate of the Ranch. Together these two interests constitute approximately an undivided 51% interest in the surface estate of the Ranch. That 51% undivided interest has been contributed to The Ginther Trusts, A Texas Joint Venture, which is the Debtor, and constitutes property of the Debtor's estate. The Debtor has the authority to deal with that interest in the Ranch, as well as the equitable title in the Ranch of the persons who are the beneficiaries of the two trusts.

4. The remaining undivided interest in the surface estate of the Ranch is owned of record by approximately fifteen (15) other owners (collectively the "Record Title Co-Interest Owners"), all of whom are Defendants herein. The respective record ownership interests of the

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Record Title Co-Interest Owners in the Ranch are reflected on the Commitments for Title Insurance attached hereto as **Exhibit "A"** and incorporated herein. Intervenor, Amber Ginther does not own a record ownership interest in the Ranch, but claims an ownership interest as well as a homestead interest in the Ranch. Erin Leigh Ginther owns an interest in the mineral estate of the Ranch. For purposes of this Final Judgment, the term "Co-Interest Owners" means Amber Ginther, Erin Leigh Ginther, and the parties listed in Item 3 of Schedule A on each of the Commitments for Title Insurance attached hereto as **Exhibit "A"** and incorporated herein (such parties listed in such Item 3 being the Record Title Co-Interest Owners). The Debtor and the Co-Interest Owners own undivided interests in the Ranch, as tenants in common, joint tenants, or tenants by the entirety. Debtor and the Co-Interest Owners own all of the surface estate of the Ranch and all or substantially all of the outstanding oil, gas and other minerals with respect to the Ranch.

5. All or a portion of the Ranch is leased to EDCCI, which operates the El Dorado Country Club on a portion of the Ranch.

6. In the summer of 1998, Jerry Crawford made a bid to purchase the Ranch at a purchase price of $11,300,000.00. The bid was accepted by the Debtor, subject to bankruptcy court approval and other conditions contained in such bid. Prior to execution of an earnest money contract reflecting the proposed sale, Mr. Crawford assigned his interests and rights in the transaction to Redstone Properties.

7. On November 5, 1998, subject to bankruptcy court approval, the Debtor, as Seller, entered into a Sale and Purchase Agreement with Redstone Properties for the sale of the Ranch. The original Purchase Price (as defined in the Sale and Purchase Agreement) for the Property was $11,300,000.00.

8. The Sale and Purchase Agreement has been amended by First Amendment to Sale and Purchase Agreement ("First Amendment") dated February 1, 1999, Second Amendment to Sale and Purchase Agreement ("Second Amendment") dated April 16, 1999, Third Amendment to Sale and Purchase Agreement ("Third Amendment") dated May 7, 1999, Fourth Amendment to Sale and Purchase Agreement ("Fourth Amendment") dated July 9, 1999, Fifth Amendment to Sale and Purchase Agreement ("Fifth Amendment") dated July 13, 1999, Sixth Amendment to Sale and Purchase Agreement ("Sixth Amendment") dated November 24, 1999, and Seventh Amendment to Sale and Purchase Agreement ("Seventh Amendment") dated January 26, 2000 (the Sale and Purchase Agreement, as amended, herein being called the "Sale and Purchase Agreement").

9. Redstone Properties has assigned its interest in the Sale and Purchase Agreement to Redstone Acquisition.

10. Pursuant to the terms of the Sale and Purchase Agreement, as amended, the total acreage to be sold to Redstone Acquisition is approximately 1,643.94 acres, as more particularly described on **Exhibit "B"** attached to this Final Judgment and incorporated herein, together

with all improvements thereon and all rights and appurtenances thereto (herein the "Property"), for a total Purchase Price of $10,000,000.00.

11. Pursuant to the terms of an Assignment Agreement (as amended) between Redstone Properties and Jerry Crawford, upon (and only upon) completion of the closing of the acquisition of the Property by Redstone Acquisition, Mr. Crawford is entitled to receive a fee of $700,000 from Redstone Properties.

12. Pursuant to the terms of a Fee Agreement between Mr. Crawford and Don J. Davis, Mr. Crawford will pay $350,000 of the $700,000 fee to Don J. Davis.

13. The Sale and Purchase Agreement is conditioned upon the Debtor's obtaining either Ratifications of the Sale and Purchase Agreement by the Co-Interest Owners, or the Debtor's obtaining an Order from the Bankruptcy Court under 11 U.S.C. § 363(h), authorizing sale of both the Debtor's interest and the interests of all non-ratifying Co-Interest Owners.

14. On September 8, 1998, the Debtor filed its Disclosure Statement. On November 24, 1998, the Debtor filed its First Amended Disclosure Statement with respect to its First Amended Plan of Reorganization (the "Amended Plan").

15. The Amended Plan provides for the liquidation of all the Debtor's assets with the proceeds of the tangible assets to be used to satisfy all Allowed Claims in full.

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The Amended Plan is to be funded by the proceeds of the sale of the Debtor's interest in the Property, and is conditioned upon sale of the Property.

16. On February 1, 1999, the Debtor filed its Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363. On September 23, 1999, the Debtor filed its First Amended Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363. On October 15, 1999, the Debtor filed its Second Amended Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363 (the Motion, as amended by the First Amended Motion and the Second Amended Motion, herein being called the "Motion to Sell").

17. Notice of the Motion to Sell was properly given pursuant to the requirements of Rules 2002, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure.

18. On February 1, 1999, the Debtor filed its Plaintiff's Original Complaint in order to force the sale of the Ranch over the objection of dissenting or non-consenting Co-Interest Owners. On July 14, 1999, the Debtor filed its Plaintiff's First Amended Complaint. On August 16, 1999, filed its Second Amended Complaint, and on October 14, 1999, the Debtor filed its Third Amended Complaint (Plaintiff's Original Complaint, as amended, being hereinafter referred to as the "Adversary Proceeding").

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19. Pursuant to Order Consolidating Motion to Sell with Adversary Proceeding and Setting Pretrial Deadlines, entered April 21, 1999, the Court consolidated the Debtor's Motion to Sell with the Adversary Proceeding.

20. Summons have been issued on the following Defendants, who have been properly served with the summons and a copy of the Complaint: Noble C. Ginther, Jr.; Stuart Douglas Ferrell; Stuart Douglas Ferrell, Trustee; Noble C. Ginther, III, Trustee for the Fallon Renee Ginther Trust; Noble C. Ginther, III, Trustee for the Chelsea Leigh Ginther Trust; Esther Duff, Executor of the Estate of Gordon A. Duff; Esther Duff, Successor Trustee; Mercantile Bank of Southern Illinois, Successor Trustee of the Wife's Trust and the Residuary Trust Under the Last Will dated October 6, 1987 of Gordon A. Duff; Edmond Lee "Pat" Ginther; Barbara A. Ginther Nelson; John N. Randall; Rosanne Van Dorn Ginther; Marilyn Deshong; Nucorp, Inc.; Bobbie Bayless, Receiver; Advent Trust Company, Successor Corporate Trustee of the NCG Trust; Advent Trust Company, Successor Corporate Trustee of the Noble C. Ginther Trust, and the Minnie L. Ginther Trust; Tri-Texas Realty, Inc.; Ferrell Realty Corp.; Fergus M. Ginther; Adriana Ginther; Erin Lee Ginther; and Stone Mountain Petroleum, LLC.

21. Although duly served, Stuart Douglas Ferrell; Stuart Douglas Ferrell, Trustee; Noble C. Ginther III, Trustee for the Fallon Renee Ginther Trust; Noble C. Ginther III, Trustee for the Chelsea Leigh Ginther Trust; Advent Trust Company, Successor Corporate Trustee of the

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NCG Trust; Advent Trust Company, Successor Corporate Trustee of the Noble C. Ginther Trust and the Minnie L. Ginther Trust; Esther Duff, Executor of the Estate of Gordon A. Duff; Esther Duff, Successor Trustee; Mercantile Bank of Southern Illinois, Successor Trustee of the Wife's Trust and the Residuary Trust Under the Last Will dated October 6, 1987 of Gordon A. Duff; Edmond Lee "Pat" Ginther; Barbara A. Ginther Nelson; John N. Randall; Rosanne Van Dorn Ginther; Marilyn Deshong; Tri-Texas Realty, Inc.; Ferrell Realty Corp.; Erin Lee Ginther; and Stone Mountain Petroleum, LLC. (the "Defaulting Defendants") have failed to file an answer or any pleading constituting an answer and have not entered an appearance. The deadline for filing an answer has passed.

22. The Court has jurisdiction over the Adversary Proceeding pursuant to 28 U.S.C. § 157. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(N) and (O).

23. Venue is proper in this Court pursuant to 28 U.S.C. § 1409, as the main bankruptcy case is pending in this Court.

24. Certain Defendants have executed Ratification Agreements, approving and authorizing the sale of the Property pursuant to the terms and conditions of the Sale and Purchase Agreement. Ratification Agreements have been executed by Nucorp, Inc.; Rosanne Van Dorn Ginther; Edmond Lee "Pat" Ginther; Marilyn Deshong; Advent Trust Company, Successor Corporate Trustee

of the NCG Trust; Advent Trust Company, Successor Corporate Trustee of the Noble C. Ginther Trust and the Minnie L. Ginther Trust; Barbara A. Ginther Nelson; and John N. Randall.

25. Objections to the Motion to Sell were filed by Harris County-State of Texas, the Texas Natural Resource Conservation Commission, Noble Ginther, Jr., Fergus and Adriana Ginther, and Tebear Investments, Inc.

26. Answers to the Adversary Proceeding were filed by Noble Ginther, Jr., Stuart Douglas Ferrell, and Fergus and Adriana Ginther.

27. Amber Ginther filed a Motion to Intervene, claiming ownership and homestead interests in the Ranch. In the Motion, Amber Ginther asked to intervene as a party in support of the sale, subject to Court approval of the Settlement Agreement (herein defined). The Court granted the Motion to Intervene by Order entered January 31, 2000.

28. The objections of Noble Ginther, Jr. to the Complaint and the Motion to Sell have been withdrawn pursuant to the terms of a settlement agreement entered into among the Debtor, Redstone Acquisition, Noble C. Ginther, Jr., Amber Ginther, and El Dorado Tract GP, Inc., a copy of which is attached hereto as **Exhibit "C"** and incorporated herein (herein being called the "Settlement Agreement"). Although the Debtor is a nominal party to the Settlement Agreement, no consideration is being paid by the Debtor under the Settlement Agreement.

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29. The requirements of Section 363(b) and Section 363(h) of the Bankruptcy Code have been met.

30. Partition in kind of the Property is impossible due to the variation in the land and the great number of owners of the Property. Accordingly, the requirements of Section 363(h)(1) are met in that partition in kind of the Property among the Debtor's estate and the Co-Interest Owners is impracticable.

31. The requirements of Section 363(h)(2) have been met in that sale of the Debtor's undivided interest in the Property would realize significantly less for the Debtor than sale of such Property free and clear of the interests of the Co-Interest Owners.

32. The requirements of Section 363(h)(3) have been met in that the benefit to the Debtor of a sale of such Property free of the interests of the Co-Interest Owners outweighs the detriment, if any, to the Co-Interest Owners.

33. The requirements of Section 363(h)(4) have been met in that the Property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

34. Pursuant to Section 363(h) of the Code, the Debtor is authorized to sell both the Debtor's interest, and the interests of the Co-Interest Owners, in the Property.

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35. No Defendants have asserted a vested or contingent right in the nature of dower or curtesy. To the extent that any Defendant asserts such a right, the Property should be sold free and clear of any and all such rights.

36. The Debtor marketed the Property in a professional and diligent manner. In exercising its business judgment, the Debtor has acted in good faith and determined that the sale of the Property is in the best interest of the Debtor, its estate, and its creditors.

37. The sale of the Property is in the best interests of the Debtor, its estate, its creditors, and the Co-Interest Owners.

38. The sale of the Debtor's interest in the Property is the best means available for providing cash to satisfy the allowed claims of creditors.

39. The Sale and Purchase Agreement was negotiated in an arms length transaction and in good faith, and the terms and conditions are fair and are equitable and in good faith.

40. Redstone Acquisition is purchasing the Property in good faith within the meaning of Section 363(m) of the Bankruptcy Code.

41. Upon Redstone Acquisition's purchase of the Property, it is contemplating selling a portion of the Property (such portion herein being called the "Johnson Portion") to an entity affiliated with Larry Johnson (such

entity herein being called the "Johnson Entity") for a purchase price of $8,500,000. Redstone Acquisition's sale of the Johnson Portion to the Johnson Entity is in good faith. The Johnson Entity's purchase of the Johnson Portion is in good faith.

42. Pursuant to Section 363(f) of the Bankruptcy Code, the Debtor is entitled to sell both the Debtor's interest in the Property and the interests of the Co-Interest Owners free and clear of any interests in the Property, including but not limited to free and clear of all liens, claims, and encumbrances, except for the Permitted Encumbrances (herein defined).

43. The sale of the Property represents sound business judgment.

44. The Purchase Price of $10,000,000.00 is the highest and best obtainable under present market conditions and circumstances.

45. Time is of the essence with regard to obtaining authorization to consummate the sale. Redstone Properties and Redstone Acquisition have committed substantial resources and reserved substantial capital to undertake the purchase of the Property. Delaying the sale until confirmation of a Plan of Reorganization would result in potential loss of the sale to Redstone Acquisition and loss of a viable purchaser of the Property.

46. In reference to any payments to be received from the sale by either Jerry Crawford or Don Davis, there is

no evidence of bad faith or evidence of unreasonableness with regard to the Debtor's estate. In light of the nature of the Property, the claims against the Debtor's estate, and the parties making claims against the Property, sale of the Property is the absolute best thing that can happen to this Property. In light of that, and the sales price of the Property, the payment of $700,000.00 is reasonable under the circumstances.

It is therefore, **ORDERED, ADJUDGED, AND DECREED** that:

1. The Debtor's Motion to Sell is granted.

2. Final Judgment is awarded in favor of the Debtor in the Adversary Proceeding. The Debtor is authorized to sell to Redstone Acquisition full fee simple title to the Property (including both the surface and mineral estates), which includes both the Estate's undivided interest in the Property and the interests of the Co-Interest Owners in the Property, pursuant to the terms of the Sale and Purchase Agreement and this Order, free and clear of all Encumbrances (herein defined), except for the Permitted Encumbrances (herein defined). Specifically, but without limitation, the Debtor is authorized to sell to Redstone Acquisition full fee simple title to the Property (including both the surface and mineral estates), which includes both the Debtor's undivided interest in the Property and the interests of the Co-Interest Owners in the Property, free and clear of all of the Unacceptable Encumbrances (herein defined). As used herein, the term "Encumbrances" shall mean any and all liens, claims,

leases, mineral leases, outstanding mineral interests, interests, rights, reservations, restrictions and other matters and encumbrances that affect all or any portion of the Property. As used herein, the term "Permitted Encumbrances" shall mean those Encumbrances referred to in (a) items 11, 12, 13, 15, 17, 19, 20, 21, 26, 34, 38, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 63 and 66 of Schedule B to that certain Commitment for Title Insurance ("Redstone Title Commitment") issued by Charter Title Company on behalf of Lawyers Title Insurance Corporation, bearing GF No. 98030451, having an effective date of December 29, 1999 and an issued date of January 7, 2000, and (b) items 15, 16, 17, 19, 20, 21, 22, 24, 25, 35, 36, 40, 41, 46, 48, 49, 52, 53, 54, 55, 56, 57, 58, 59, 60, 63 and 66 of Schedule B to that certain Commitment for Title Insurance ("Johnson Title Commitment") issued by Charter Title Company on behalf of Lawyers Title Insurance Corporation bearing GF No. 98030451-B, having an effective date of December 29, 1999 and an issued date of January 7, 2000. The Redstone Title Commitment and the Johnson Title Commitment are herein collectively called the "Title Commitments", and are attached hereto as **Exhibit "A"** and incorporated herein. As used herein, the term "Unacceptable Encumbrances" shall mean all Encumbrances, save and except the Permitted Encumbrances. The Unacceptable Encumbrances specifically include, without limitation, (a) all of the matters set forth in the Title Commitments, including those matters set forth in Schedules B and C to the Title Commitments, but expressly excluding the Permitted Encumbrances, (b) all leases and other rights of

occupancy in favor of EDCCI or any other party, (c) all rights and other interests (including possessory rights) of any party holding under EDCCI, including without limitation, all subtenants, licensees, employees, agents, officers, directors and shareholders of EDCCI and all members of the golf club EDCCI has been or is operating on a portion of the Property, (d) any homestead or other claims or interests of Noble C. Ginther, Jr. or Amber Ginther, (e) any interests or claims of Fergus M. Ginther and Adriana Ginther and (f) all property, maintenance and similar agreements. Debtor's conveyance of full fee simple title to the Property (including both the surface and mineral estates) to Redstone Acquisition by Debtor on its own behalf and on behalf of all of the Co-Interest Owners shall be free and clear of all Encumbrances (including the Unacceptable Encumbrances), except for the Permitted Encumbrances.

3. The Debtor is authorized and directed, both on its own behalf and on behalf of all of the Co-Interest Owners, to execute and deliver all documents and instruments necessary, appropriate or desirable to complete a sale of the Property (which includes the interests of the Debtor and the Co-Interest Owners in the Property) to Redstone Acquisition upon such terms and conditions as are described in, or contemplated by, the Sale and Purchase Agreement. Such documents and instruments include, but are not limited to, an instrument entitled "Special Warranty Deed, Easement, Assignment, Declaration of Restrictions and Other Agreements" ("Deed") in form acceptable to Debtor and Redstone Acquisition which, among other things, (i) is sufficient

to satisfy the requirements of Sections 5(b)(1) and 5(b)(2) of the Sale and Purchase Agreement, (ii) imposes the restriction on the portion of the Land Debtor and the Co-Interest Owners are retaining, such restriction being described in Section 8(b) of the Third Amendment, (iii) sets forth the agreement regarding Harris County Water Control and Improvement District No. 96 contemplated in Section 5(b)(1)(vii) of the Sale and Purchase Agreement (such subpart (vii) being created by Section 4 of the Fifth Amendment), and (iv) creates the access and utility easement referred to in Section 4 of the Sixth Amendment. All such documents and instruments (including the Deed) executed and delivered by the Debtor on behalf of the Co-Interest Owners shall be binding on such Co-Interest Owners to the same extent and with the same effect as if the Co-Interest Owners had themselves executed and delivered all such documents and instruments (including the Deed).

4. At the closing ("Closing") of the sale to Redstone Acquisition, all costs and expenses of the sale shall be paid out of the sales proceeds pursuant to the terms of the Sale and Purchase Agreement. In addition, at Closing, all ad valorem taxes on the Ranch through the date of Closing shall be paid out of the sales proceeds, including ad valorem taxes attributable to the interests of the Debtor and the Co-Interest Owners , but excluding any additional taxes arising because of changes in land usage or ownership (the ad valorem taxes payable out of the sales proceeds herein being called the "Ad Valorem Taxes"). Ad Valorem Taxes and other costs and expenses attributable to the interests of the

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Debtor shall be paid out of the Debtor's portion of the Net Proceeds, and Ad Valorem Taxes attributable to the interests of each Co-Interest Owner shall be paid out of each respective Co-Interest Owner's share of the Net Proceeds. The requirement that Co-Interest Owners pay their pro rata portion of Ad Valorem Taxes shall not have any prejudicial effect on the Co-Interest Owners' right to bring a claim against Debtor's portion of the Net Proceeds from the sale for payment of current or past Ad Valorem Taxes. In no event shall any Co-Interest Owner have any claim against the Property.

5. The net proceeds ("Net Proceeds") of the sale of the Property shall consist of the proceeds of the sale, less (i) the costs and expenses of the sale, including but not limited to all costs and expenses to be paid by Debtor at Closing pursuant to the terms of the Sale and Purchase Agreement, but not including any compensation to the Debtor; and (ii) all Ad Valorem Taxes due and owing on the Ranch. All valid liens, claims and encumbrances against the Debtor are transferred to and shall attach to the Debtor's share of the Net Proceeds. All valid liens, claims, and encumbrances against any Co-Interest Owner are transferred to and shall attach to such Co-Interest Owner's share of the Net Proceeds except as provided in paragraph 14 below.

6. At Closing, the Net Proceeds of the sale shall be distributed as follows: that portion of the Net Proceeds of the sale attributable to Debtor's interest as reflected on the Title Commitments shall be paid by Charter Title Company to Debtor for deposit in an interest-bearing

and separate account at Southwest Bank of Texas, N.A. ("Debtor Net Proceeds Account") pending further Order of this Court; that portion of the Net Proceeds of the sale attributable to the interests of the Co-Interest Owners as reflected on the Title Commitments shall be deposited by Charter Title Company in a separate interest-bearing account pending distribution to the Co-Interest Owners as provided in this Final Judgment. No Co-Interest Owner shall receive any Net Proceeds until such Co-Interest Owner signs and delivers to Charter Title Company an affidavit pursuant to Section 1445 of the Internal Revenue Code in a form reasonably satisfactory to Redstone Acquisition. Each Co-Interest Owner who has delivered such affidavit to Charter Title Company will receive the Co-Interest Owner's share of the Net Proceeds plus accrued interest upon delivery of the affidavit unless an objection to such distribution has been filed with this Court (and a copy of such objection has been received by Charter Title Company, 700 Louisiana, Suite 3340, Houston, Texas, 77002, Attn: Mr. Garry L. Carr), or unless, in the opinion of Charter Title Company, there are unresolved defects, liens, or other matters that may affect title to the land or the interest insured. In the event an objection to the distribution of funds to a Co-Interest Owner is filed and received by Charter Title Company, or in the event that, in the opinion of Charter Title Company, there are unresolved defects, liens, or other matters that may affect title to the land or the interest insured, Charter Title Company is hereby authorized to retain any such funds in the interest-bearing account pending further Order of this Court as to the proper distribution of such funds or

to deposit such funds into the registry of this Court or if such deposit is refused by this Court, any other court of competent jurisdiction.

7. At the Closing of the sale to Redstone Acquisition, the Debtor shall pay to Tebear Investments, Inc., out of the Debtor's portion of the Net Proceeds, the sum of $75,000.00, representing the principal amount of Tebear Investment, Inc.'s claim, plus interest in the amount of $15,646.00, for a total payment of $90,646.00 (less $18.50 per day that the Closing funds prior to April 1, 2000 or plus $18.50 per day that the Closing funds after April 1, 2000). Upon payment by Redstone Acquisition of the $10,000,000.00 Purchase Price, Tebear Investments, Inc.'s lien on the Property shall be automatically released without the necessity of taking any further action; however, as Tebear Investment, Inc.'s claim exceeds such sum, Tebear Investment, Inc.'s lien is transferred to and shall attach to the Debtor's share of the Net Proceeds held in the Debtor Net Proceeds Account.

8. Notwithstanding the provisions of paragraph 6 above, at the Closing of the sale to Redstone Acquisition, Charter Title Company shall deposit that portion of the Net Proceeds attributable to the 3.125% interest in the Property held by the estate of Noble C. Ginther into an interest-bearing account at Southwest Bank of Texas, N.A. to be jointly controlled by the Debtor and Bobbie G. Bayless, Receiver. Such account shall be maintained so long as the receivership over certain assets established by Harris County, Texas, Probate Court No. 4, in Case

No. 231,749-405, styled *Elton M. Hyder, III, et al., v. NationsBank of Texas, N.A., et al.*, continues, and shall be held in that manner until any disputes concerning ownership have been resolved or otherwise decided by a court of competent jurisdiction.

9. Debtor is authorized to execute a letter authorizing Charter Title Company to not issue an owner policy of title insurance to Purchaser covering all of the Property, but rather to issue two owner policies of title insurance, one in favor of Redstone Acquisition covering a portion of the Property and one to Redstone Acquisition's purchaser covering the remaining portion of the Property; provided however, the total cost to Debtor and the other Co-Interest Owners for such owner policies of title insurance shall not exceed the cost which would have been incurred by Debtor and the Co-Interest Owners if one owner policy of title insurance in the amount of $10,000,000 had been issued to Redstone Acquisition covering all of the Property.

10. The Settlement Agreement is hereby approved. If and only if the Closing of the sale actually occurs, Redstone Acquisition is ordered to comply with its terms by paying at Closing $300,000 to Noble C. Ginther, Jr., and Amber Ginther, jointly, and by paying $100,000 to a segregated fund dedicated to severance pay for the employees of EDCCI. The payments by Redstone Acquisition are in addition to the $10,000,000 Purchase Price for the Property. No payments are due Amber Ginther from the Net Proceeds. If the Closing of the sale does not occur for any reason whatsoever, including but

not limited to default by Redstone Acquisition, no amounts will be payable by Redstone Acquisition to Noble and Amber Ginther under the Settlement Agreement.

11. The Debtor shall prepare and file a statement of the completion of the sale herein, including a description of any and all documents or instruments executed and delivered in connection therewith, and all proceeds received from such sale, and include a copy of a deposit slip showing the amount of Debtor's Net Proceeds placed in the Debtor's interest-bearing account described herein, a copy of a deposit slip showing the amount of the Co-Interest Owners' Net Proceeds deposited by Charter Title Company, and an accounting of any Net Proceeds not distributed to the Co-Interest Owners and the reason such Net Proceeds were not distributed. The Debtor shall serve a copy of such statement by mail on the United States Trustee, the Official Committee of Unsecured Creditors, all creditors, all Co-Interest Owners, all parties requesting notice, and any other parties claiming an interest in the Property, including all lienholders.

12. Any claims that might be made with respect to the Property, the Debtor, or the distribution of the Net Proceeds shall be asserted in this Court as part of this case.

13. Notwithstanding any other provision herein, this Order does not in any manner release, limit or affect the obligations of Redstone Acquisition as buyer to comply with all applicable law including, but not limited to,

local, state, and federal rules, regulations, statutes, permits and orders, pertaining to environmental requirements. The provisions of this item 13 are based on Redstone Acquisition's understanding that the Texas Natural Resource Conservation Commission ("TNRCC") is not presently aware of any environmental liabilities associated with the Ranch that are not related to releases from the underground petroleum storage tanks referred to in **Exhibit "F"** to the Purchase and Sale Agreement dated November 5, 1998 between The Ginther Trusts, A Texas Joint Venture, and Redstone Properties.

14. Nucorp, Inc. is the record owner of a 9.375% interest in the Property, as reflected by the Title Commitments, and has complete authority to sell or otherwise deal with such 9.375% interest in the Property, subject to (a) execution of the affidavit pursuant to Section 1445 of the Internal Revenue Code referred to in paragraph 6 above and (b) release of the deed of trust liens filed under Clerk's File Nos. S037324 and S339624 in the Official Public Records of Real Property of Harris County, Texas. Nucorp, Inc. shall receive distribution of such 9.375% interest in the Net Proceeds, subject to the provisions of paragraph 6 above, free and clear of all liens and free and clear of any lis pendens filed with respect to the Property. While this Final Judgment, the disbursement to Nucorp, Inc., and the findings of fact and conclusions of law set forth herein shall not have res judicata or collateral estoppel effect on Fergus Ginther's or Adriana Ginther's state law claims against Nucorp, Inc. or Don Davis, for purposes of this Final Judgment approving

the sale of the Property, this Final Judgment constitutes a final order of sale regarding the sale of the Property to Redstone Acquisition, notwithstanding any subsequent determination of Fergus Ginther's and/or Adriana Ginther's state law claims against Nucorp, Inc. and Don Davis.

15. Pursuant to Section 363(i) of the Bankruptcy Code, before consummation of the sale to Redstone Acquisition, any Co-Interest Owner, as identified on the Title Commitments, may purchase the Property for the sum of $10,000,000.00. It is anticipated that the sale to Redstone Acquisition shall close on a date which is on or after eleven days and on or before fourteen business days after the date of entry of this Final Judgment. The Debtor and Redstone Acquisition may extend the closing date by written agreement to a date which is twenty-one days after the date of entry of this Final Judgment. No further extensions may be made without the agreement of Noble and Amber Ginther and the approval of this Court.

16. This Final Judgment constitutes a final appealable judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure, as modified by Rule 9021 of the Federal Rules of Bankruptcy Procedure. This Final Judgment shall also be docketed in the Debtor's main bankruptcy case, being case No. 98-32663-H4-11, and shall represent final disposition of both the Adversary Proceeding and the Debtor's Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. 363.

Appendix E

Dated: 3/1/00

s/ William Greendyke
UNITED STATES BANKRUPTCY
JUDGE

Presented by:

s/ David P. McClain
David P. McClain
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s/ Julia A. Cook
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Attorney for Redstone Properties, LLC
and Redstone El Dorado Acquisition, L.P.

Appendix E

s/ John F. Higgins (signed by permission by JAC)
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Creditors' Committee

s/ Joseph M. Hill
Joseph M. Hill
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Attorney for Nucorp, Inc.

Approved as to form:

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Attorney for Tebear Investments, Inc.

Appendix E

Approved as to Form Only:

s/ Hayden Burns
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Attorney for Amber Ginther and
Noble C. Ginther, Jr.

Approved as to Form except as to
Paragraphs 5 and 14:

s/ Berry D. Bowen
Berry D. Bowen
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Attorney for Fergus M. Ginther and
Adriana N. Ginther

Appendix E

Approved as to Form as to Paragraph 13 Only:

s/ Hal F. Morris
signed by permission
Edith Stuart Phillips
Hal F. Morris
Assistant Attorney General
Bankruptcy & Collections Division
P.O. Box 12548
Austin, Texas 78711-2548
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Facsimile: (512) 482-8341

Attorney for Texas Natural Resource
Conservation Commission

APPENDIX F — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ON MOTION TO DISMISS DATED AND ENTERED JUNE 24, 1998

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 98-32663
CHAPTER 11

IN RE:
THE GINTHER TRUSTS,
A TEXAS JOINT VENTURE

Debtor.

ORDER ON MOTION TO DISMISS

The Court has considered the Motion to Dismiss and for Sanctions filed by Elton M. Hyder, III, et al. and finds that the relief requested should be granted in part. The Court finds that the case should be dismissed unless the Petition and Schedules are amended within the time and in the manner ordered herein, but that sanctions should not be imposed. It is therefore,

ORDERED, that this case shall be dismissed without further order of the Court unless Debtor, on or before June 26, 1998: (a) amends the Petition, Schedules and Statement of Financial Affairs to provide that it is a joint venture composed solely of the Nobel C. Ginther Grantor Trust

a/k/a N.C. Ginther Grantor Trust; and (b) amends its Schedules and Statement of Financial Affairs to provide that the only property of the joint venture comprising Debtor's bankruptcy estate is its interests in or relating to the el Dorado Golf Club, Inc. and the real estate known as the "El Dorado Ranch" described in Debtor's existing Schedules as "undivided interest in approximately 2,033 acres of real property located in Harris County, Texas." It is further,

ORDERED that no other property, whether listed in the Debtor's existing Schedules or otherwise, is property of the Debtor's bankruptcy estate or subject to the automatic stay pursuant to 11 U.S.C. § 362. It is further,

ORDERED that the Debtor shall have the exclusive right to file a plan of reorganization up to and including September 9, 1998, and, if the Debtor files a plan within such exclusive period, the Debtor shall have the exclusive right to seek confirmation of a plan up to and including November 6, 1998. It is further,

ORDERED that the deadline for filing Proofs of Claim shall be extended to and expire on July 31, 1998. It is further,

ORDERED that a special meeting of creditors pursuant to 11 U.S.C. § 341 shall be July 15, 1998 at 1:30 p.m. at 515 Rusk, Room 3401, Houston, Texas 77002. It is further,

ORDERED that the Clerk of Court shall serve a copy of this Order on all creditors and parties in interest listed on the mailing matrix or who have file notices of appearance in this case.

Appendix F

SIGNED on June 24, 1998.

s/ William Greendyke
UNITED STATES BANKRUPTCY
JUDGE

APPROVED AS TO FORM:

s/ Barnet B. Skelton, Jr.
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ATTORNEY FOR MOVANTS

David P. McClain, P.C.

s/ David P. McClain
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ATTORNEY FOR THE GINTHER
TRUSTS, A TEXAS JOINT VENTURE

Appendix F

s/ Nancy Holley
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ATTORNEY FOR THE UNITED STATES TRUSTEE

APPENDIX G — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION AFFIRMING "ORDER RESCINDING ORDER" AND "ORDER DISPERSING FUNDS" DATED JANUARY 3, 2001 AND ENTERED JANUARY 4, 2001

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-00-1691

FERGUS M. GINTHER and ADRIANA N. GINTHER

Appellants,

versus

CHARTER TITLE COMPANY; NUCORP, INC.; and DON J. DAVIS

Appellees.

ORDER

Pending before the Court is an appeal by Appellants Fergus M. Ginther and Adriana N. Ginther ("Ginthers") of three orders of the United States Bankruptcy Court for the Southern District of Texas ("bankruptcy court") dated April 10, 2000: first, an "Order Depositing Interpleader Funds Into the Registry of the Court in an Interest-Bearing Account': second, an "Order Rescinding Order"; and third, an "Order Dispersing Funds." Having considered the parties'

submissions and the applicable law, the Court finds that the orders of the bankruptcy court should be **AFFIRMED**.

I.

On March 11, 1998, The Ginther Trusts ("Debtor") filed a voluntary petition for bankruptcy relief. The bankruptcy court held a trial on January 27, 2000, to consider a motion by the Debtor to sell its 51% property interest in the El Dorado Ranch located in Harris County, Texas. In an order dated march 1, 200, the bankruptcy court held that Nucorp, a co-owner of the El Dorado Ranch was entitled to a 9.375% interest in the net proceeds of the sale of the property (Instrument No. 19, Ex. 1 at 13). In addition, the court ruled that appellee Don J. Davis ("Davis"), a majority shareholder in Appellee Nucorp, Inc. ("Nucorp"), would receive $350,000.00 pursuant to a previously arranged fee agreement. The sale of the El Dorado Ranch closed on March 23, 2000. Appellee Charter Title Company ("Charter") handled the closing of the sale.

On March 3, 2000, following the bankruptcy court's final judgment, the Ginthers sent a letter to Charter expressing their objection to the disbursement of any proceeds to Nucorp or Davis. The letter requested that Charter "either retain the funds in an interest bearing account or deposit any funds or proceeds otherwise to be disbursed to Don J. Davis or NuCorp, Inc. from the [property] sale [ ] into the registry of the Bankruptcy Court or the registry of the 270th District Court and interplead the claims of the Ginthers, Davis and NuCorp in that proceeding." (Instrument No. 18, Ex. 1(B), at 1). Consequently, on approximately March 27, 2000,

Charter filed an interpleader with the bankruptcy court and tendered the net proceeds of the property sale into the court's registry. (*Id.* Ex. 1, at 2).

On April 10, 2000, the bankruptcy court issued three orders, two of which are now the subject of the Ginthers' appeal. First, the bankruptcy court ordered that the interpleaded funds be deposited into the registry of the court in an interest-bearing account. (Instrument No. 18, Ex. 2). Second, the bankruptcy court then rescinded the previous order because "the funds ordered interplead into the Registry by Charter [ ] cannot be disbursed by the Clerk prior to a seven-day clearing period . . . [and] a more prompt disbursement is necessary under the circumstances and in light of its prior orders and judgment in this case." (*Id.* Ex. 3). Third, the bankruptcy court ordered that the interpleaded funds be endorsed to Joseph M. Hill, the attorney for Nucorp and Davis. Upon receipt, Hill was ordered to disburse the funds to Nucorp and Davis.

On April 19, 2000, in an emergency proceeding requested by the Ginthers, Judge Lynn N. Hughes of the United States District Court for the Southern District of Texas denied the Ginthers' motion to stay the bankruptcy court's April 10, 2000, disbursement order pending appeal. (Instrument No. 12). Pursuant to Judge Hughes' order, the Ginthers' filed their appellate brief on April 26, 2000. (Instrument No. 16). In their appeal, the Ginthers contend that the bankruptcy court did not have jurisdiction over Charter's interpleader because it did not implicate "the debtor, its estate[,] or the administration thereof." (*Id.* at 4). The Ginthers also argue that the bankruptcy court's orders

deprived them of due process of law because they "were entitled to have their claim heard as in an ordinary civil action." (*Id.* at 5). Finally, the Ginthers contend that this Court has original jurisdiction over the interpleader. That is, according to the Ginthers, the interpleader "arises" under 28 U.S.C.A. § 1335 (2000).

Nucorp and Davis filed their brief on April 28, 2000. (Instrument No. 20). They maintain that the bankruptcy court's orders "were entered merely to enforce the [bankruptcy court's] prior ruling. As such, there was nothing new in those orders, and nothing that [the] Ginther[s] could separately appeal." (*Id.* at 5). Nucorp and Davis next argue that under section 363(j) of the Bankruptcy Code the bankruptcy court was authorized to make a determination of the rights of co-owners of property sale proceeds. In any event, according to Nucorp and Davis, the bankruptcy court had ancillary jurisdiction over the interpleader because the proceeds of the property sale had a direct relation to property or assets of the Debtor. Finally, Nucorp and Davis assert that the Ginthers are estopped from challenging the proceeds distribution because, following the bankruptcy court's final judgment, the Ginthers sought relief in state court. They contend that the issue has "already been fully considered and rejected by the state court."

II.

The district court review *de novo* the decisions of the bankruptcy court on matters of law. *See In re Mendoza*, 111 F.3d 1264, 1266 (5th Cir. 1997). Bankruptcy court findings of fact are reviewed under the clearly erroneous standard.

See Fed. R. Bankr. P. 8013. However, a finding of fact premised on an improper legal standard or on a proper legal standard that is improperly applied "losses the insulation of the clearly erroneous rule." *See In re Missionary Baptist Found. Of Am.*, 818 F.2d 1135, 1142 (5th Cir. 1987).

III.

The Ginthers contend in this appeal that the bankruptcy court was without jurisdiction to entertain the interpleader filed by Charter. Consequently, the Ginthers maintain, the bankruptcy court's order directing the disbursement of the proceeds from the sale of the debtor property to Nucorp and Davis was improvidently issued. In contrast, Nucorp and Davis assert that the bankruptcy court was merely enforcing the final judgment it rendered on March 1, 2000. According to Nucorp and Davis, the bankruptcy court's disbursement order was "entered merely to enforce [its] prior ruling. As such, there was nothing new in [the disbursement order], and nothing that [the] Ginther[s] could separately appeal." (Instrument No. 20, at 5).

The Court finds Nucorp and Davis' reasoning persuasive. The Ginthers' assertion that the bankruptcy court "should have adjudicated the competing claims prior to order dispersal," (Instrument No. 16, at 5), ignores the reality that the bankruptcy court approved Nucorp's share of the proceeds in the March 2000 final judgment. In that judgment, the bankruptcy court held that "Nucorp, Inc. is the record owner of a 9.375% interest in the Property as reflected by the Title Commitments and has complete authority to sell or otherwise deal with such 9.375% interest in the Property."

(Instrument No. 19, Ex. 1, at 13). The bankruptcy court also ruled that "this Final Judgment constitutes a final order of sale regarding the sale of the Property . . . notwithstanding any subsequent determination of [the Ginthers'] state law claims against Nucorp, Inc. and Don Davis." (*Id*).

Ironically, although the Ginthers now object to the bankruptcy court's jurisdiction over Charter's interpleader, that proceeding was precisely the course of action they recommended to Charter. In a letter dated two days after the bankruptcy court's final judgment, the Ginthers' attorney asserted an interest in the proceeds and requested that Charter "either retain the funds in an interest bearing account or deposit any funds or proceeds otherwise to be disbursed to Don J. Davis or NuCorp, Inc. from the [property] sale [ ] into the registry of the Bankruptcy Court . . . and interplead the claims of the Ginthers, Davis and NuCorp in that proceeding." (Instrument No. 18, Ex. 1(B), at 1). In short, the Ginthers desire to have their cake and eat it too.[1] In likely anticipation that Charter would seek to avoid liability arising from its disbursement of the proceeds, the Ginthers suggested an interpleader in order to set the stage for an otherwise untimely appeal of the bankruptcy court's final judgment issued on March 1, 2000.

The Ginthers correctly noted in their March 3, 2000, letter to Charter that pursuant to the bankruptcy court's final

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1. This aphorism stems from the writings of English author John Heywood. Originally, the adage was expressed as: "Would ye both eat your cake and have your cake?" This and other colloquial English phrases were first printed in *The Proverbs of John Heywood* in 1546.

judgment, they were entitled to object to the distribution for the sale proceeds. In the final judgment however, the bankruptcy court clearly ruled that it would be the forum to address any objections. According to the bankruptcy court:

> In the event an objection to the distribution of funds to a Co-Interest Owner is filed and received by Charter [ ], . . . Charter [ ] is hereby authorized to retain any such funds in the interest-bearing account *pending further Order of this Court as to the proper distribution of such funds* or to deposit such funds into the registry of this Court, or if such deposit is refused by this Court, any other court of competent jurisdiction.

(Instrument No. 19, Ex. 1, at 11) (emphasis added).

Indeed, the bankruptcy court's April 10, 2000, order disbursing the funds awarded in this final judgment represents its enforcement of the March 2000 final judgment. *See In re Chateauguay Corp.*, 201 B.R. 48, 62 (Bankr. S.D.N.Y. 1996) (holding bankruptcy courts have "Inherent jurisdiction to interpret and enforce its own orders and to determine disputes"); *see also In re Paris Indus. Corp.*, 132 B.R. 504, 508 (Bankr. D. Maine 1991) (holding that bankruptcy courts have the authority to "enforce prior orders and 'secure or preserve the fruits and advantages of a judgment or decree rendered therein. . . . The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause . . ."). Although it was the result of an interpleader, the bankruptcy court's order merely reiterated the final judgment. Accordingly, the Ginthers' true

means of redress of the bankruptcy court's decision to grant part of the proceeds to Nucorp and Davis was through a direct appeal of the final judgment, not of the April 2000 disbursement order.

IV.

Based on the foregoing, the Court finds that the bankruptcy court's orders dated April 10, 2000, should be **AFFIRMED**. The Court additionally finds that, because any further appeals would be frivolous, this Order should not be stayed.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 3rd day of January, 2001, at Houston, Texas.

s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DENYING MOTION FOR STAY PENDING APPEAL DATED AND ENTERED APRIL 11, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

MC ACTION H-00-110

Ginther

versus

Charter Title

CONFERENCE MEMORANDUM

Date: 4-18-00

* * *

At the conference, these rulings were made:

(1) Motion for stay is denied (1).

(2) Ginther has until noon on April 21 to abandon in claim.

(3) If Ginther persists in its claim, Ginther must file a brief by April 19, 2000.

(4) Defendants must respond by April 21, 2000.

APPENDIX I — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DISPERSING FUNDS DATED AND ENTERED APRIL 10, 2000

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CASE NO. 98-32663-H4-11

IN RE:
THE GINTHER TRUSTS

DEBTOR

ADV. NO: 99-3058

THE GINTHER TRUSTS

Plaintiff

v.

NOBLE C. GINTHER, JR., ET AL and CHARTER TITLE COMPANY

Defendants

ORDER DISPERSING FUNDS

In accordance with the court order allowing Charter Title Company to place funds in Court's registry in the respective

amounts of $511,405.56, $350,000.00, and $224,352.38, it is hereby ORDERED

1. The Clerk of Court is authorized to endorse the above-referenced checks to Joseph Hill.

2. Upon receipt, Joseph Hill is Ordered to dispense the funds to the following entities:

   A) De Lange, Hudspeth, McConnell & Tibbets, L.L.P. in the amount of $4,856.00;

   B) Nucorp, Inc. in the amount of $509,129.84;

   C) Don J. Davis in the amount of $223,334.47; and

   D) Don J. Davis in the amount of $348.427.63.

3. Within 10 days of the entry of this order, Joseph Hill is directed to file a certificate certifying that the above-referenced disbursements were made in accordance with this Order.

Signed this 10th day of April, 2000.

s/ William Greendyke
UNITED STATES BANKRUPTCY JUDGE

APPENDIX J — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION RESCINDING ORDER DATED AND ENTERED APRIL 10, 2000

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CASE NO. 98-32663-H4-11

IN RE:
THE GINTHER TRUSTS

DEBTOR

ADV. NO: 99-3058

THE GINTHER TRUSTS

Plaintiff

v.

NOBLE C. GINTHER, JR., ET AL and CHARTER TITLE COMPANY

Defendants

ORDER RESCINDING ORDER

This matter came before the Court on April 10, 2000. At that hearing, the Court signed an Order Depositing

Appendix J

Interpleader Funds into Registry of the Court in an Interest-Bearing Account. Subsequent to that hearing, the Order was entered by the Clerk's Office.

The Court has now learned that the "original Order Depositing Interpleader" was entered improvidently. It has come to the Court's attention that the funds ordered interplead into the Registry by Charter Title cannot be disbursed by the Clerk prior to a seven-day clearing period. It is the Court's conclusion that a more prompt disbursement is necessary under the circumstances and in light of its prior orders and judgment in this case. Consequently, by separate form of order, the Clerk shall be authorized to receive from Charter three checks in the amounts recited and to endorse them in favor of Joseph M. Hill, who shall in turn be given specific disbursement instructions by the Court. The foregoing tender to the Clerk for endorsement shall constitute sufficient compliance with this Court's order for Charter to "pay into the Registry" for interpleader purposes.

Therefore, for good cause found, it is hereby ORDERED that the Order Depositing Interpleader Funds into Registry of the Court in an Interest-Bearing Account is rescinded.

Signed this 10th day of April, 2000.

s/ William Greendyke
UNITED STATES BANKRUPTCY
JUDGE

APPENDIX K — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DEPOSITING INTERPLEADER FUNDS INTO THE REGISTRY OF THE COURT IN AN INTEREST-BEARING ACCOUNT DATED AND ENTERED APRIL 10, 2000

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NO. 98-32663-H4-11
(CHAPTER 11)

In re:
THE GINTHER TRUSTS,
a Texas joint venture,

Debtor

ADVERSARY NO. 99-3058

THE GINTHER TRUSTS,
a Texas joint venture

Plaintiff

VS.

NOBLE C. GINTHER, JR., ET AL

Defendants

Appendix K

ORDER DEPOSITING INTERPLEADER FUNDS INTO THE REGISTRY OF THE COURT IN AN INTEREST-BEARING ACCOUNT

On March 29, 2000, Defendant, Charter Title Company, filed with the Court its Motion for Interpleader, wherein it requested that the funds held by it be deposited into the registry of the court. The Court, having examined such interpleader, and being of the opinion that such funds should be deposited in an interest-bearing account, it is ORDERED that the District Clerk place the funds interpled by Charter Title Company, in the respective amounts of $511,405.56, $350,000.00 and $224.352.38, totaling $1,085,757.94, into an interest-bearing account at an approved depository institution.

SIGNED this 10th day of April, 2000.

s/ William Greendyke
UNITED STATES BANKRUPTCY JUDGE

APPENDIX L — EXCERPTS FROM FIFTH AMENDED AND RESTATED REVOCABLE TRUST AGREEMENT DATED APRIL 7, 1989

FIFTH AMENDED AND RESTATED
REVOCABLE TRUST AGREEMENT

THE STATE OF TEXAS

COUNTY OF HARRIS

WHEREAS, NOBLE C. GINTHER and MINNIE LEE GINTHER (the "Grantors") created a revocable trust agreement on the 29th day of December, 1986, with NOBLE C. GINTHER as the Trustee (the "Trustee"), such revocable trust being known as the GINTHER REVOCABLE TRUST; and

* * *

NOW THEREFORE, the trust agreement, known as the Ginther Revocable Trust, as amended and restated by the First Amendment, Second Amendment, Third Amendment and Fourth Amendment is hereby amended and restated in its entirety for the fifth time ("Fifth Amendment") on this the 7th day of April, 1989 as follows, it being the express intentions of both of the Grantors that any revocation of such trust agreement heretofore attempted is wholly ineffective, null and void:

THIS FIFTH AMENDED AND RESTATED REVOCABLE TRUST AGREEMENT made and entered into this 7th day of April, 1989, between NOBLE C. GINTHER (the "Husband") and MINNIE LEE GINTHER (the "Wife"),

of Houston, Texas as Grantors (the "Grantors"), and NOBLE C. GINTHER , of Houston, Texas, as Trustee (the "Trustee").

ARTICLE I — BENEFICIARIES AND DISTRIBUTIONS

1.1 The trust initially created by this trust instrument shall be known as the "GINTHER REVOCABLE TRUST." The Trustee shall hold, manage, sell, exchange, invest and reinvest the trust property, collect all income and, after deducting such expenses as are properly payable, shall accumulate and distribute the income and principal as herein provided.

* * *

1.4 Following the death of the first Grantor to die (hereafter called the "deceased Grantor"), the Trustee shall divide all of the then remaining trust property into two separate shares, which may be unequal in value. One of such shares shall initially contain that portion of the trust property which constituted the community and separate property of the surviving Grantor (hereinafter called the "surviving Grantor"). This share, which shall be known by the name of the surviving Grantor (though hereinafter called the "surviving Grantor's Trust"), shall be held, administered and distributed as provided in Article II. The other share shall initially contain that portion of the trust property which constituted the community and separate property of the deceased Grantor. This share, which shall be known by the name of the deceased Grantor (though hereinafter called the "deceased Grantor's Trust"), shall be held, administered and distributed as provided in Article III.

* * *

Appendix L

ARTICLE II — SURVIVING GRANTOR'S TRUST

* * *

2.5 Upon the death of the surviving Grantor, any accrued but unpaid net income of the surviving Grantor's Trust shall be distributed to the surviving Grantor's estate and the remaining unappointed trust principal of the surviving Grantor's Trust (which remains after making any payments provided in section 2.4), together with all property received by the Trustee under the Will of the surviving Grantor and all other property received by the Trustee as the result of the death of the surviving Grantor, shall be added to the principal of the deceased Grantor's Trust to be held, administered and distributed as provided in Article III as a part of the deceased Grantor's Trust.

* * *

ARTICLE IV — TRUSTEE APPOINTMENTS

4.1 If the Husband resigns or otherwise ceases to act as Trustee, then the Wife and RIVER OAKS TRUST COMPANY shall immediately become Co-Trustees of all trusts created by this Trust Agreement. On the death of the first Grantor to die, the surviving Grantor and RIVER OAKS TRUST COMPANY shall immediately become Co-Trustees of all trusts created by this Trust Agreement to serve with any Trustee of Trustees then serving. Unless another meaning is clearly indicated or required by context of circumstance, the term "Trustee" shall mean and include any co-fiduciaries, alternates or successors.

* * * *

Supreme Court, U.S.
FILED
JUN 29 2001
OFFICE OF THE CLERK

No. 00-1666

IN THE

Supreme Court of the United States

In the Matter of: THE GINTHER TRUSTS,
A Texas Joint Venture

FERGUS M. GINTHER,

Petitioner,

v.

THE GINTHER TRUSTS, A Texas Joint Venture;
and REDSTONE EL DORADO ACQUISITION, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT REDSTONE EL DORADO ACQUISITION, L.P.

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QUESTION PRESENTED

Despite Petitioner's attempts to create jurisdictional and constitutional issues, this case involves a simple application of 11 U.S.C. § 363(m) in the context of a bankruptcy sale. The Bankruptcy Court entered a Final Judgment authorizing the sale to Respondent as a good faith purchaser, Petitioner's requests to stay the sale were denied, and the sale closed. As such, Petitioner's appeal was rendered moot. The only question presented on appeal was whether application of 11 U.S.C. § 363(m) was correct. Because the district courts and the courts of appeal have consistently applied 11 U.S.C. § 363(m) in this context to render an appeal moot, the rulings of the District Court and the Fifth Circuit were correct, and there is no unsettled or important question presented which warrants this Court's review.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the Adversary Proceeding in the Bankruptcy Court below are identified in the Final Judgment, attached as Appendix E to the Petition. (Pet. App. E, 14a-15a; 21a-23a).

Redstone Group, Ltd. is the 99% limited partner of Redstone El Dorado Acquisition, L.P. The general partner of Redstone Group, Ltd. is Redstone, Inc. a Texas corporation. There is no publicly held company that owns 10% or more of the corporation's stock.

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Appendix B — Excerpts From Transcript Dated January 28, 2000; Judge Greendyke's Oral Ruling On Motion To Sell/Amended Motion To Sell/2nd Amended Motion To Sell (Transcript, Jan. 28; 230-243) 5a

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the statutes cited by Petitioner:

11 U.S.C. § 101:

> Section 101. Definitions
>
> In this title —
>
> (41) "person" includes individual, partnership, and corporation, ...

Tex. Rev. Civ. Stat. Ann. art. 6132b-1.01(14):

> Article 6132b-1.01. General Definitions
>
> In this Act —
>
> (14) "Person" includes an individual, corporation, business trust, estate, trust, custodian, trustee, executor, administrator, nominee, partnership (including a registered limited liability partnership and a limited partnership), association, limited liability company, government, governmental subdivision, governmental agency, governmental instrumentality, and any other legal or commercial entity, in its own or representative capacity.

STATEMENT OF THE CASE

On March 11, 1998, The Ginther Trusts, a Texas Joint Venture ("Debtor"), filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code.

On March 13, 1998, certain judgment creditors filed a Motion to Dismiss and for Sanctions ("Motion to Dismiss")

asserting that there was no joint venture, that the Debtor consisted of trusts which were ineligible to file bankruptcy, and that the Debtor had no assets.

After a multi-day evidentiary hearing on the Motion to Dismiss, on June 24, 1998, the Bankruptcy Court entered its Order on the Motion to Dismiss, finding that the two grantor trusts, which held record title to a 51-53% interest in the El Dorado Ranch (hereinafter the "Ranch"), were a de facto joint venture, and further finding that the only property of the Debtor's estate was the 51-53% undivided interest in the Ranch, as well as the Debtor's interest in the El Dorado Golf Club, Inc. The Order further determined that no other property was property of the Estate.[1] No appeal was taken from that Order.

On February 1, 1999, having negotiated a Sale and Purchase Agreement to sell the Ranch, the Debtor filed a Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363 ("Motion to Sell"). Because the Debtor only owned a 51% interest in the Ranch, the Debtor filed an Adversary Proceeding ("Adversary Proceeding") under 11 U.S.C. § 363(h) to compel sale of both the Estate's interest in the Ranch and the interests of the co-owners.

The Motion to Sell and the Adversary Proceeding were consolidated. After a two day trial on January 27, 2000 and January 28, 2000, Judge Greendyke ruled in favor of the Debtor and ordered sale of 1643.94 acres of the Ranch to Redstone El Dorado Acquisition, L.P. ("Redstone").[2] A Final Judgment approving the sale was entered on March 2, 2000, from which Petitioner appeals.[3]

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1. Resp. App. A.

2. Resp. App. B at 5a-11a.

3. Pet. App. E.

Petitioner filed motions to stay enforcement of the Final Judgment in the Bankruptcy Court, the District Court, and the Fifth Circuit. All requests were denied.[4] Relying on the finality of the sale order, Redstone and the Debtor closed the sale of the property to Redstone on March 23, 2000.

Petitioner was not originally a party to the Adversary Proceeding, as he is not a co-interest owner. He was added to the Adversary Proceeding after he filed a lis pendens in the Real Property Records claiming an interest in the Ranch due to a dispute between Petitioner and Nucorp, Inc., one of the co-interest owners. On appeal, however, Petitioner's arguments are based upon his position as a beneficiary of the two grantor trusts which, as joint venturers, make up the Debtor.[5]

By the time of the trial of the Motion to Sell and the Adversary Proceeding, all co-interest owners had either defaulted or ratified the sale.[6] Petitioner did not attend the trial. Counsel for Petitioner did not put on any witnesses. In fact, the only testimony regarding Petitioner was that he had no objection to the sale or the price. Judge Greendyke found that even Petitioner's counsel recognized that the sale of the Ranch was a positive thing to occur.[7]

Subsequent to the sale to Redstone, Redstone sold almost half of the surface estate to North Belt/767, L.P., and almost half of the mineral estate to Mesa Road Partners.

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4. Pet. App. C at 9a-10a; Pet. App. D. at 11a-12a.

5. Subsequent to entry of the Final Judgment, Petitioner apparently disputed distribution of sales proceeds to Nucorp, Inc. *See* Pet. 8 n.2; 10-11; Pet. App. G, App. H, App. I, App. J, App K. Petitioner did not raise that issue in this appeal, however, in either the District Court or Fifth Circuit below.

6. Pet. App. E at 16a-17a; 21a-23a.

7. Resp. App. B at 5a.

There are two clear factual misstatements in the Petition. Petitioner claims that during the trial "it was conceded" that the Debtor "owned no interest of record in the El Dorado Ranch."[8] In fact, the Court's June 24, 1998, Order on the Motion to Dismiss determined that the two grantor trusts, which together held record title to a 51% interest in the Ranch, were a de facto joint venture, and that the 51% interest in the Ranch was property of the Debtor's Estate.[9] Because record title was in the name of the two grantor trusts,[10] Petitioner argued at trial that the Debtor did not own any interest in the Ranch. The Bankruptcy Court found this argument disingenuous.[11]

Second, Petitioner states that: "The trustee, who did not appear in the adversary proceeding, ratified the transaction and executed the deed, but received nothing for the conveyance of the property entrusted to it."[12] This is inaccurate. Mr. James Cox, designated representative of Advent Trust Company, the trustee of each of the grantor trusts, appeared at trial and testified in support of the sale. Pursuant to the Final Judgment entered by the Bankruptcy Court, the property was sold for the sum of $10,000,000, which price was paid at closing. Pursuant to the Final Judgment, the Debtor's pro rata share of the sales proceeds, attributable to its 51% interest in the Ranch, was placed into a Debtor Net Proceeds Account, pending further Order of the Court.[13] While a check was not technically written to Advent Trust Company, as Trustee, the money went into the Debtor's Net Proceeds Account to be used by the Debtor to fund its Plan of Reorganization.

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8. Pet. at 9.

9. Resp. App. A.

10. Pet. App. E at 16a.

11. Resp. App. B at 5a-7a.

12. Pet. at 10.

13. Pet. App. E at 31a-33a.

REASONS FOR DENYING THE WRIT

The sole question presented in the appellate courts below was whether application of 11 U.S.C. § 363(m) rendered the appeal moot. Under 11 U.S.C. § 363(m), the reversal on appeal of an authorization of a sale of property under § 363(b) does not affect the validity of a sale to an entity which purchased the property in good faith. This provision has been interpreted consistently by the bankruptcy courts, the United States District Courts, and the United States Courts of Appeal as rendering moot any appeal of a sale authorized under § 363(b), to a good faith purchaser, in the absence of a stay pending appeal, once the sale actually occurs. Because Petitioner was not successful in obtaining a stay of the sale to Redstone, there was an affirmative finding of the Bankruptcy Court of Redstone's good faith, and the sale closed, both the District Court and the Fifth Circuit held that Petitioner's appeal was moot.

There is no split in the Circuits on this issue. Case law in the Circuit Courts has consistently held that application of § 363(m) renders an appeal moot once the sale closes, when there is no stay on appeal and the purchaser is in good faith. The appeal is moot because, by statute, the appellate court cannot fashion any relief which would affect the validity of the sale. The cases cited by Petitioner do not reflect a division on this issue. *In re Osborn*;[14] *In re BCD Corp.*,[15] and *In re Lloyd*,[16] merely hold that an appeal may not be moot *if the appellant seeks remedies which do not affect the validity of the sale.* For example, if the appellant claims an interest in the sales proceeds, and his interest has been denied, there may still be reason to address the merits of the appeal. This is simply an exception to the mootness doctrine. The cases are consistent in

14. 24 F.3d 1199 (10th Cir. 1997).

15. 119 F.3d 852 (10th Cir. 1997).

16. 37 F.3d 271 (7th Cir. 1994).

holding that the validity of the sale should not be disturbed on appeal.

Petitioner implies that he does not attempt to affect the validity of the sale. Before the Fifth Circuit, however, he asked the Court to dismiss the bankruptcy case of the Debtor and set aside the Final Judgment approving the sale to Redstone. Certainly to Redstone, as purchaser, and its title insurer, such relief would affect the validity of the sale. Moreover, without the Final Judgment in place, Petitioner admits that he would again challenge Redstone's status as a good faith purchaser in "another forum." He would then use this as the basis for pursuing his claim that a constructive trust should be placed on his claimed 12.86% undivided interest in the property sold.[17]

Petitioner does not need to set the Final Judgment or the sale aside to claim an interest in the sales proceeds. As a beneficiary of the two grantor trusts, he has an interest in the net proceeds of the sale which were deposited in the Debtor's Net Proceeds Account pursuant to the Final Judgment. He will eventually receive his pro rata share of these proceeds through distributions under the Plan of Reorganization, which has now been confirmed.

The truth is that Petitioner does not want the Bankruptcy Court to decide how the proceeds should be distributed. As requested relief in this appeal, he asks the Court to find that the Bankruptcy Court has no jurisdiction over the Debtor. If he is granted the relief requested, the Bankruptcy Court will not have jurisdiction over the remaining sales proceeds in the Debtor's account, leaving Petitioner, numerous creditors and family members to engage in continued litigation regarding their claimed interests in the proceeds.[18]

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17. Pet. at 16, 20-21, 28; Brief for Appellants (5th Cir.) at 12, 25-26.

18. The need for finality in this case is real. Petitioner's litigation to date includes his state court suit against Nucorp, Inc.; the post-

(Cont'd)

Equitable and practical considerations further dictate that the Final Judgment and the sale to Redstone be affirmed, and that this appeal be declared moot. The Bankruptcy Court found, without question, that the sale of the property to Redstone was in the best interests of the Estate and all parties involved, including the co-interest owners. There were no co-interest owners who objected to the sale. The sales proceeds have all been distributed by the title company. Taxes and closing costs have been paid. Sale proceeds have been distributed to the co-interest owners and their lienholders, who are not parties to this appeal. The remaining 51% has been placed in the Debtors Net Proceeds Account, and a liquidating plan of reorganization has been confirmed in the Debtor's case. Almost half of the acreage sold to Redstone has been transferred to third parties who are not parties to this proceeding. Construction of a golf course and residential development on the property has begun. The impossibility of undoing the sale which has already occurred, and the effect it will have on all parties involved, are practical matters that deserve consideration by this Court and further dictate that the Petition for Certiorari be denied.

The Fifth Circuit's ruling was correct in all respects. There is no split amongst the Circuits regarding the proper application of 11 U.S.C. § 363(m), and Redstone urges this Honorable Court to deny the Petition for Certiorari.

(Cont'd)
judgment dispute with Charter Title Company; a separate suit filed against Advent Trust Company, the trustee of the two grantor trusts; the present appeal; and anticipated appeal of confirmation of the Debtor's Plan. Pet. at 8-9 n.2; 10-12, 14, 21. Pet. App. G, App. H, App. I, App. J, App. K. *See In re Ginther*, 791 F.2d 1151 (5th Cir. 1986).

I. THE FIFTH CIRCUIT FOLLOWED ESTABLISHED CASE LAW IN APPLYING 11 U.S.C. § 363(m)

As reflected by its opinion, the Fifth Circuit relied on application of 11 U.S.C. § 363(m) in holding that the Bankruptcy Court's authorization of the sale could not be reversed or modified once Petitioner failed to obtain a stay of the sale and the sale closed. The Fifth Circuit interprets this section to moot an appeal, in the absence of a stay, once a sale has occurred.[19] As stated in *In re Gilchrist* (5th Cir. 1990):

> Section 363(m) patently protects, from later modification on appeal, an authorized sale where the purchaser acted in good faith and the sale was not stayed pending appeal.[20]

The Fifth Circuit's holding in *In re Gilchrist* is based upon an adoption of the Seventh Circuit's interpretation of § 363(m) as set forth in the case of *In re Sax* (7th Cir. 1986).[21] As interpreted by *In re Gilchrist* and *In re Sax*, § 363(m) expresses a policy of affording finality to judgments of the bankruptcy court as well as giving finality to orders and judgments upon which third parties rely.[22]

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19. *In re Gilchrist*, 891 F.2d 559, 560 (5th Cir. 1990); *In re Bleaufontaine, Inc.*, 634 F.2d 1383, 1389-1390 (5th Cir. 1981).

20. *In re Gilchrist*, 891 F.2d at 559.

21. 796 F.2d 994 (7th Cir. 1986).

22. See *American Grain Association v. Lee-Vac, Ltd.*, 630 F.2d 245, 247-248 (5th Cir. 1980); *In re Bleaufontaine, Inc.*, 634 F.2d at 1389.

II. THERE IS NO SPLIT IN THE CIRCUITS REGARDING APPLICATION OF § 363(m)

Petitioner claims that there is a split in the circuits regarding application of 11 U.S.C. § 363(m). As revealed by a careful reading of Petitioner's own Petition, as well as the relevant case law, this is inaccurate.

In *In re Gilchrist* and *In re Sax*, the Fifth and Seventh Circuits hold that in the context of a bankruptcy sale, under 11 U.S.C. § 363(m), when a property is sold to a good faith purchaser and there is no stay pending appeal, an appeal challenging the sale is moot, and the court does not need to reach jurisdictional issues raised by Petitioner.

There is no split in the Circuits on this issue. The Circuit Courts have consistently held that 11 U.S.C. § 363(m) protects an authorized sale from later modification on appeal, where the purchaser acted in good faith and the sale was not stayed pending appeal.[23]

The Circuit Courts have consistently held that the protection of § 363(m) applies whether the order of sale is challenged on jurisdictional or other grounds.[24]

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23. *See In re Rickel Home Centers, Inc.*, 209 F.3d 252 (3d Cir. 2000); *Pittsburgh Food & Beverage v. Ranallo*, 112 F.3d 645 (3d Cir. 1997); *In re Gucci*, 126 F.3d 380 (2d Cir. 1997); *In re CGI Industries, Inc.*, 27 F.3d 296 (7th Cir. 1994); *In re Gilchrist*, 891 F.2d 559 (5th Cir. 1990); *In re Stadium Management Corp.*, 895 F.2d 845 (1st Cir. 1990); *In re Onouli-Kona Land. Co.*, 846 F.2d 1170 (9th Cir. 1988); *In re Sax*, 796 F.2d 994 (7th Cir. 1986); *In re Bleaufontaine, Inc.*, 634 F.2d 1383 (5th Cir. 1981).

24. *Pittsburgh Food & Beverage v. Ranallo*, 112 F.3d 645, 650 (3d Cir. 1997); *In re Gilchrist*, 891 F.2d 559, 560-561 (5th Cir. 1990); *In re Sax*, 796 F.2d 994, 997-998 (7th Cir. 1986).

Petitioner argues that application of 11 U.S.C. § 363(m) has resulted in an "absolute mootness" doctrine that ignores this Court's general Article III mootness analysis as set forth in *Mills v. Green*,[25] and reiterated in *Church of Scientology of California v. United States*.[26]. That is incorrect. These cases merely set forth the general proposition that where circumstances change during the course of an appeal, through no fault of the defendant, such that it is no longer possible for the Court to grant effective relief to the plaintiff, it is proper to dismiss the appeal as moot.[27] On the other hand, if effective relief can still be granted, the appeal is not moot.[28]

Petitioner's argument reveals a misunderstanding of both 11 U.S.C. § 363(m) and the rationale behind it. Petitioner characterizes it as an "absolute mootness" rule.[29] In application, however, it is not an absolute mootness rule. Other courts have referred to § 363(m) as a "bankruptcy mootness rule" or a "statutory mootness" provision.[30] The latter is probably the most accurate label. Whatever terminology is used, however, it is consistently recognized that the rule developed from two principles: (1) the general rule, as set forth in *Mills v. Green* and *Church of Scientology*, that the occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot; and (2) the specific need for finality in bankruptcy coupled with the need to protect the interest of a

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25. 159 U.S. 651, 16 S. Ct. 132 (1895).

26. 506 U.S. 9, 113 S. Ct. 447 (1992).

27. *Mills v. Green*, 159 U.S. at 653, 16 S. Ct. at 133.

28. *Church of Scientology*, 506 U.S. at 13, 113 S. Ct. at 450.

29. *See In re Filtercorp, Inc.*, 163 F.3d 570, 576 (9th Cir. 1998).

30. *In re Onouli-Kona Land Co.*, 846 F.2d at 1171-1172; *In re Rickel Home Centers, Inc.*, 209 F.3d at 298.

good faith purchaser.[31] Essentially, once property is sold to a good faith purchaser, the appellate court can no longer render effective relief because to disturb the sale would require affecting the rights of a good faith purchaser.

In application, 11 U.S.C. § 363(m) is not an "absolute mootness" rule because there are specific criteria which are necessary before the rule will be applied. There must be an order of sale by the Bankruptcy Court, the order of sale must not have been stayed pending appeal, the sale at issue must have closed, and the purchaser must be a good faith purchaser.

Moreover, in practice, the Courts have consistently recognized an exception to the statutory mootness rule specifically where the appellant seeks relief that does not affect the validity of the sale. Petitioner cites the cases of *In re Osborn*, (10th Cir. 1997),[32] *In re BCD Corp.*, (10th Cir. 1997),[33] and *In re Lloyd*, (7th Cir. 1994)[34] as reflecting a "split in the Circuits" regarding application of 11 U.S.C. § 363(m).[35] In fact, however, these cases only deal with the exception to application of 11 U.S.C. § 363(m) where the validity of the sale is not being contested.

In *In re Osborn*, the debtor claimed a homestead exemption on certain property. The exemption was denied, and the Debtor appealed the order denying the exemption. Meanwhile, the

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31. *In re Onouli-Kona Land Co.*, 846 F.2d at 1172; *Pittsburgh Food & Beverage*, 112 F.3d at 647-648; *In re CGI Industries*, 27 F.3d at 299; *In re Stadium Management Corp.*, 895 F.2d at 847.

32. 24 F.3d 1199 (10th Cir. 1997).

33. 119 F.3d 852 (10th Cir. 1997).

34. 37 F.3d 271 (7th Cir. 1994).

35. Pet. at 16.

property was sold by the trustee. Although the property had been sold, the Tenth Circuit held that the Debtor's appeal was not moot because the court could still grant to the Debtor some effective relief if the denial of the homestead exemption was wrong.[36] Section 363(m) did not bar the appeal because the Debtor did not seek to affect the validity of a sale to a good faith purchaser.[37] Because a ruling in the Debtor's favor could entitle him to an interest in the proceeds of the sale of his homestead, the appeal was not moot.[38]

In re BCD Corporation[39] is in accord with *In re Osborn*. In *In re BCD Corporation*, an initial sale of the Debtor's property to the highest bidder was set aside, and the property was resold to a third party. On appeal, the sale to the third party was not at issue. The original bidder claimed that the bankruptcy court's initial order setting the sale aside was improper, while the Debtor claimed that the appeal was moot because the property had been resold. Under *In re Osborn*, the Tenth Circuit found that the appeal was not moot because, if successful, the appellant might be entitled to an interest in the sale proceeds.[40]

The case of *In re Lloyd* comes out of the same circuit as *In re Sax* and is in no way inconsistent with the ruling in *In re Sax*. Similar to *In re Osborn*, the case of *In re Lloyd* dealt with a denial of the Debtor's claimed homestead exemption and subsequent sale of the property. The Debtor appealed from the denial of the homestead exemption. Applying 11 U.S.C. § 363(m), the Seventh Circuit held that the Debtor

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36. *In re Osborn*, 24 F.3d at 1203.

37. *Id.*. at 1203-1204.

38. *Id.* at 1204.

39. 119 F.3d 852 (10th Cir. 1997).

40. *In re BCD Corporation*, 119 F.3d at 856-857.

could not challenge the sale itself. The property had been sold to a good faith purchaser, and the sale would not be overturned. However, because the Debtor also claimed an interest in the proceeds of the sale, the Court held that the appeal was not entirely moot.[41]

Petitioner argues that *In re Onouli-Kona Land Co.*, (9th Cir. 1988)[42] and *In re Filtercorp, Inc.*, (9th Cir. 1998)[43] apply an absolute mootness analysis which ignores the general Article III mootness analysis set forth in *Mills v. Green* and *Church of Scientology of California v. United States*. Petitioner's argument fails to grasp the fact that the rule set forth in 11 U.S.C. § 363(m) is actually based upon that very same Article III mootness analysis; i.e., when there is a change of events during the course of an appeal that prevents an appellate court from granting effective relief, the appeal becomes moot.

In re Onouli-Kona Land Co. does not ignore the principles set forth in *Mills v. Green* and *Church of Scientology*, nor is it in conflict with *In re Osborn*; *In re BCD Corp.*, or *In re Lloyd.* In *In re Onouli-Kona Land Co.*, the Debtor sought to overturn a sale of property sold at foreclosure by arguing for an exception to § 363(m) where the creditor/purchaser is a party to the appeal. The Court found no justification for such an exception. The Court noted, however, that it did honor one exception to the bankruptcy mootness rule, based upon its ability to fashion relief, where the property is sold to a party/creditor and the foreclosure sale is subject to a statutory right of redemption.[44]

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41. *In re Lloyd*, 37 F.3d at 273.

42. 846 F.2d 1170 (9th Cir. 1988).

43. 163 F.3d 570 (9th Cir. 1998).

44. *In re Onouli-Kona Land Co.*, 846 F.2d at 1172-1175.

In re Filtercorp is also not in conflict with *In re Osborn*; *In re BCD Corp.*, or *In re Lloyd*, or with *Mills v. Green* and *Church of Scientology*. In *In re Filtercorp*, appellant argued that § 363(m) should not apply, claiming that the court could fashion effective relief. Once again, the Court found no basis for an exception to the bankruptcy mootness rule because the relief sought by the appellant would result in undoing the sale.[45]

Despite Petitioner's claims, there is no split in the circuits regarding application of 11 U.S.C. § 363(m), nor was application of § 363(m) in the present case in any way offensive to this Court's general Article III mootness analysis.

III. PETITIONER IS NOT ENTITLED TO AFFECT THE VALIDITY OF THE SALE

Pursuant to 11 U.S.C. § 363(m), Petitioner is not entitled to obtain any relief on appeal which would affect the validity of the sale. Petitioner argues that this appeal is not moot because he does not seek recovery of the land but an interest in the sale proceeds. He implies that he does not seek to overturn the validity of the sale, but any such implication is misleading at best.

In the present appeal, there is no issue regarding Petitioner's interest in the sales proceeds. Petitioner's arguments on appeal are all presented based upon his status as a beneficiary of the two grantor trusts. Under the Final Judgment, the Debtor's interest in the sales proceeds was placed into the Debtor's Net Proceeds Account. Distributions will be made from that account to creditors, including Fergus Ginther, pursuant to the Plan of Reorganization which was just confirmed by Order entered May 10, 2001. If Petitioner has a complaint about the manner in

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45. *In re Filtercorp*, 163 F.3d at 577.

which the proceeds are being distributed, he can appeal confirmation of the Plan, which he has indicated he will do.[46]

As far as Petitioner's dispute regarding the record title interest of Nucorp, Inc., Petitioner did not raise that issue as part of this appeal in either the District Court or Court of Appeals below. The Final Judgment recognizes Nucorp, Inc. as a 9.375% record title holder. It further specifically states that the Final Judgment does not have res judicata effect on Fergus Ginther's state law claims against Nucorp which he was pursuing at the time of trial, but that the Final Judgment is a final order of sale regarding the property regardless of the outcome of Fergus Ginther's state law claims against Nucorp.[47] Petitioner did not appeal these findings.

Petitioner refers to two requested remedies: an order dismissing the bankruptcy case for lack of subject matter jurisdiction, and an order overturning the Final Judgment. This would certainly affect the validity of the sale. His request is clarified by the relief he requested in his Brief to the Fifth Circuit. He asked the Court to reverse the Final Judgment and remand the case to the Bankruptcy Court with instructions that the case be dismissed and that any property[48] of the Debtor be returned to the trustee of the Ginther Revocable Trust. In the alternative, he asked that the Final Judgment be modified to reflect the imposition of a constructive trust on a 12.86% undivided interest in the land (not the sales proceeds) sold to Redstone pursuant to the Final Judgment.[49] Either of these

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46. Pet. at 14.

47. Pet. App. E at 36a-37a.

48. It is not clear if "property" was intended to refer to sales proceeds only or the real property itself.

49. Brief for Appellants (5th Cir.) at 12, 25-26.

remedies, overturning the Final Judgment, or ordering a constructive trust on the property, affects the validity of the sale.

It is further clear that Petitioner indirectly attempts to reopen the issue regarding the good faith of Redstone. The Bankruptcy Court held Redstone to be a good faith purchaser.[50] On appeal to the District Court, Petitioner attempted to raise an issue regarding Redstone's status as a good faith purchaser. The Fifth Circuit found that Petitioner could not challenge Redstone's status as a good faith purchaser on appeal because Petitioner failed to raise the issue in the trial court.[51] Yet, Petitioner continues to argue to this Court that "the purchaser's good faith is unresolved."[52]

IV. APPLICATION OF 11 U.S.C. § 363(m) DOES NOT PERVERT THE RULE IN *RUHRGAS* AND *STEEL CO.*

Petitioner argues that application of 11 U.S.C. § 363(m) in this case somehow perverts the rule set forth by this Court in *Ruhrgas v. Marathon Oil Co.*[53] and *Steel Co. v. Citizens for a Better Environment.*[54] Petitioner's argument is unfounded.

Ruhrgas has little application to the case at issue. *Ruhrgas* was a non-bankruptcy case involving state-law tort claims. The issue on appeal was, in a case removed from state to federal court, whether a district court abused its discretion by addressing a straightforward issue of personal jurisdiction without first ruling on a more complex and novel issue of subject matter

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50. Pet. App. E at 25a; Resp. App. B at 6a, 10a-11a, 16a.

51. Pet. App. A at 5a.

52. Pet. at 28.

53. 526 U.S. 574, 119 S. Ct. 1563 (1999).

54. 523 U.S. 83, 118 S. Ct. 1003 (1998).

jurisdiction. The Court found that the District Court did not abuse its discretion in addressing personal jurisdiction without first ruling on the issue of subject matter jurisdiction.[55]

Steel Company v. Citizens for a Better Environment also has little application to the present case. The issue was whether a certain statute authorized suits for past violations of the statute, and whether the plaintiff had standing to bring the suit. This Court determined that it should address the jurisdictional issue first. Because the Court found that none of the relief requested by the plaintiff would remedy its claimed injury, the plaintiff was held to have no standing to bring the suit.[56] As part of its analysis, the Court declined to endorse a practice used by several Courts of Appeal, referred to as "hypothetical jurisdiction", whereby the Court would address a merits question prior to a jurisdictional issue if the merits question was more readily resolved and the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied.[57]

The Fifth Circuit's findings in this case do not pervert the rule in either *Ruhrgas* or *Steel Co.* As noted by Petitioner, unquestionably, a federal court has the power to dismiss a case for mootness without reaching the issue of subject matter jurisdiction.[58] The Fifth Circuit's application of § 363(m), which dictates that a bankruptcy sale shall not be reversed whenever the purchaser acts in good faith and the sale is not stayed pending appeal, is a proper exercise of that power.

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55. *Ruhrgas*, 526 U.S. at 588, 1119 S. Ct. at 1572.

56. *Steel Co.*, 523 U.S. at 109-110, 118 S. Ct. at 1020.

57. *Steel Co.*, 523 U.S. at 94, 118 S. Ct. at 1012.

58. Pet. at 13.

V. APPLICATION OF 11 U.S.C. § 363(m) DOES NOT IN ANY WAY CONFLICT WITH THE REMEDY OF VACATUR

Petitioner argues that application of 11 U.S.C. § 363(m) somehow conflicts with the remedy of vacatur. Vacatur, however, is not at issue in this case, nor does the remedy of vacatur conflict with application of 11 U.S.C. § 363(m).

Under 28 U.S.C. § 2106, the Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment brought for review from a court below. Vacatur of a judgment below is considered an extraordinary equitable remedy. It is employed when a controversy presented for review becomes moot due to circumstances not attributable to any of the parties. In that situation, a party can request the appellate court to vacate the judgment below in order to prevent a judgment below, which was never fully reviewed, from having preclusive or res judicata effect. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*;[59] *United States v. Munsingwear*.[60]

Vacatur has no application here. It is a remedy applied when the circumstances justify vacating a judgment below, which is unreviewable because of mootness, so that it no longer has legal consequences. The principle behind 11 U.S.C. § 363(m) is entirely different. Under § 363(m), once the bankruptcy court authorizes a sale and the sale closes, absent a stay, the appeal becomes moot because by statute the validity of the sale must remain intact. Overturning the order which authorized the sale in the first place would by its very nature affect the validity of the sale.

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59. 513 U.S. 18, 115 S. Ct. 386 (1994).

60. 340 U.S. 36, 71 S. Ct. 104 (1950).

VI. PETITIONER'S JURISDICTIONAL ARGUMENTS ARE MISGUIDED

The crux of Petitioner's argument is that 11 U.S.C. § 363(m) should not be applied when there is an issue of subject matter jurisdiction. Petitioner's argument, however, that the Bankruptcy Court lacked subject matter jurisdiction is misguided. The issue raised by the Motion to Dismiss was really a question as to the Debtor's eligibility to file bankruptcy, not a question of subject matter jurisdiction.

Bankruptcy courts clearly have jurisdiction of all cases under Title 11; of all civil proceedings arising under Title 11, or arising in or related to cases under Title 11; and of all property of the debtor and property of the estate. 28 U.S.C. §§ 1334(a), (b), and (e); 28 U.S.C. § 157. A bankruptcy court clearly has the ability to determine who is eligible to be a Debtor under 11 U.S.C. § 109. Whether an entity qualifies as a debtor under § 109 is a question of eligibility and not of subject matter jurisdiction.[61]

Moreover, a bankruptcy court clearly has jurisdiction to determine what constitutes property of the debtor's estate. One of the fundamental functions of the Bankruptcy Court is to determine property of the bankruptcy estate. In fact, the Bankruptcy Court has exclusive jurisdiction over determinations as to what is property of the estate.[62]

The issue of the Debtor's eligibility to file bankruptcy under 11 U.S.C. § 109 was addressed by the Bankruptcy Court. Just like Petitioner, the creditors argued that the Debtor really consisted of a trust or trusts, and that trusts do not fall within the definition of "person" as used in 11 U.S.C. § 109 and as defined by 11 U.S.C. § 101(41). After a multi-day evidentiary

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61. *Matter of Phillips*, 844 F.2d 230, 235-236 n.2 (5th Cir. 1988).

62. *In re Ascher*, 128 B.R. 639, 643 (Bankr. N.D. Ill. 1991).

hearing, the Bankruptcy Court entered an Order wherein it found that the Debtor was a de facto joint venture composed of two grantor trusts, which did qualify as a debtor under Chapter 11, and that the only property of the estate was the real estate known as the "El Dorado Ranch" and the Debtor's interest in the El Dorado Golf Club, Inc.[63] No appeal was taken from that Order.

The June 24, 1998 Order was a final order in that it determined what property was property of the Debtor's estate.[64] In determining the eligibility of the Debtor, as a joint venture, to qualify as a Debtor under Chapter 11, and further determining what constituted property of the Debtor's estate, the Order was final with respect to a "single jurisdictional unit," and resolved a "discrete unit in the larger case."[65]

Petitioner has not filed an appeal from the June 24, 1998 Order, nor did he provide either the District Court or the Fifth Circuit below with the record of the hearing on the Motion to Dismiss. The factual basis for Judge Greendyke's decision that the two grantor trusts operated as a de facto joint venture and that their 51% interest in the Ranch is property of the estate is not included in the record on appeal. As noted in *In re Sax*, a bankruptcy court always has jurisdiction to determine if it has jurisdiction. That decision stands unless it is appealed properly.[66] Despite the general rule that subject matter jurisdiction can be raised at any time, "valid procedural rules cannot be ignored

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63. Resp. App. A.

64. *Matter of Greene Hospital*, 835 F.2d 589, 595 (5th Cir. 1988), *cert. denied*, 488 U.S. 820 (1988); *T&B Scottsdale Contractors, Inc. v. U.S.*, 866 F.2d 1372 (11th Cir. 1989), *cert. denied*, 493 U.S. 846 (1989). *See also Matter of Simpson*, 36 F.3d 450, 452 (5th Cir. 1994); *In re Moody*, 817 F.2d 365, 368 (5th Cir. 1987).

65. *Matter of Greene Hospital*, 835 F.2d at 593-594.

66. *In re Sax*, 796 F.2d at 998.

just because the jurisdictional decision is being challenged rather than the decision on the merits."[67] Through this appeal, Appellants attempt an improper collateral attack on an Order which was entered almost three years ago. At trial, Judge Greendyke clearly considered the Order to be a final order, and the time for appeal to have lapsed. As he said, Appellants' argument that there was no Debtor and no property of the estate was "water under the bridge".[68]

The basis for Petitioner's jurisdictional argument is also unfounded. Petitioner argues that there is no joint venture. He appears to say that there cannot be a joint venture because there are not two or more persons to form the venture. This argument is disingenuous.

The Fifth Amended and Restated Revocable Trust Agreement referred to by Petitioner, following the death of the first Grantor, actually provides for creation of two trusts — the "surviving Grantor's Trust" and the "deceased Grantor's Trust".[69] It gives the Trustee of those trusts the power to enter into any transaction on behalf of any trust even if the other party to the transaction is a trust under the Trust Agreement, and it gives the Trustee the power to continue any business, including a partnership.

Petitioner further argues that trusts are not legal entities and are not persons with capacity to enter into partnerships.[70] That is inaccurate. As noted by Petitioner, Article 6132b-2.02 of the Texas Revised Partnership Act provides that "an association of two or more persons to carry on a business

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67. *In re Sax*, 796 F.2d at 998.

68. Resp. App. B at 5a-7a.

69. Pet. App. L at 62a.

70. Pet. at 27.

for profit as owners creates a partnership" whether the association is called a "partnership" or a "joint venture". Article 6132b-1.01(14) defines "person" to include "an individual, corporation, business trust, estate, trust, custodian, trustee, executor, administrator, . . ." Thus, by the terms of the statute, a partnership in Texas can consist of two or more trusts.

VII. EQUITABLE AND PRACTICAL CONSIDERATIONS FURTHER DICTATE THAT THIS APPEAL IS MOOT

Even beyond consideration of § 363(m), as a practical matter, the Court cannot undo the sale at this point. Effective judicial relief is no longer available. As such, this appeal is moot.

Petitioner's request to overturn the Final Judgment and undo the sale would have far-reaching consequences not only to Redstone but also to a large number of additional persons who are not parties to this appeal. In reviewing the order of sale, this Court is allowed to consider both the equitable and practical considerations of undoing the sale.[71] Undoing the sale at this point is virtually impossible. Relying on the sale order's finality, Redstone has conveyed almost half of the surface estate (767.75 out of 1643.94 acres) to an unrelated third party, North Belt/767, L.P., and conveyed the minerals on the same acreage to an unrelated third party, Mesa Road Partners, both of whom are not parties to this appeal. On the property itself, a golf course and a residential development have been commenced and substantial sums of money spent in development of these projects. The title company has distributed all of the sales proceeds. As part of the closing of the sale, past taxes due and owing on the Ranch property, as well as closing costs, were paid out of the sales proceeds. The remaining proceeds were

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71. *Matter of Manges*, 29 F.3d 1034, 1042-1043 (5th Cir. 1994), *cert. denied*, 513 U.S. 1152, 115 S. Ct. 1105 (1995).

distributed pro rata to the Debtor (via the Debtor Net Proceeds Account) and the co-interest owners. Persons who held a lien against a co-owner's interest (including Petitioner who had a judgment lien) were paid before the co-interest owner was paid. Thus, millions of dollars have already been distributed to lienholders and co-interest owners, who (except for Petitioner, Redstone and the Debtor) are not parties to the appeal. As reflected by Redstone's List of Parties, there are numerous parties who are not parties to this appeal who would be affected by a reversal of the sale order. From an equitable standpoint, the effect of undoing the sale is not only virtually impossible, but would have a disastrous financial impact on the Debtor, the Debtor's creditors, the co-interest owners, their lienholders, Redstone, North Belt/767, L.P. and Mesa Road Partners. At this point, it is impossible to recoup the sales proceeds that have already been distributed to taxing authorities, co-interest owners, lienholders, and other entities who are not parties to this appeal. The Debtor would have no funding for its plan of reorganization which has been approved, its creditors would have no way of getting paid, and the co-interest owners (who either supported or did not object to the sale) would be stuck with their respective undivided interests in a property which would be greatly reduced in value. As such, both the District Court and the Fifth Circuit were correct in finding this appeal moot.

As stated by Judge Greendyke, sale of the Ranch to Redstone was in the best interest of all parties:

> **Greendyke:** I think inescapable from everything I've heard, from all the witnesses and I think it's apparent from watching the demeanor of the parties and looking at these ancient, almost twenty-year old court proceedings between the parties who are here today, I think the best thing for that 2,000 acres is to go ahead and clean it up by selling free and clear of

all these claims and interests to somebody who will do something with it besides fight over it.[72]

CONCLUSION

The only real issue before this Court is whether the Fifth Circuit properly affirmed the District Court Order's granting Debtor's and Redstone's Motion to Dismiss the Appeal as moot. Due to the fact that the sale has occurred, that Petitioner was not successful in obtaining a stay pending appeal, and that Redstone was a good faith purchaser, this appeal is moot and the Fifth Circuit was correct in affirming the Order of the District Court. This case raises no significant issue that warrants this Court's review, and Redstone respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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Counsel of Record
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& SILVER, L.L.P.
Attorneys for Respondent
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(713) 785-1700

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72. Resp. App. B at 7a.

APPENDIX A — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ON MOTION TO DISMISS DATED AND ENTERED JUNE 24, 1998

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 98-32663
CHAPTER 11

IN RE:
THE GINTHER TRUSTS,
A TEXAS JOINT VENTURE

Debtor.

ORDER ON MOTION TO DISMISS

The Court has considered the Motion to Dismiss and for Sanctions filed by Elton M. Hyder, III, et al. and finds that the relief requested should be granted in part. The Court finds that the case should be dismissed unless the Petition and Schedules are amended within the time and in the manner ordered herein, but that sanctions should not be imposed. It is therefore,

ORDERED, that this case shall be dismissed without further order of the Court unless Debtor, on or before June 26, 1998: (a) amends the Petition, Schedules and Statement of Financial Affairs to provide that it is a joint venture composed solely of the Nobel C. Ginther Grantor Trust

a/k/a N.C. Ginther Grantor Trust and the Minnie Lee Ginther Grantor Trust a/k/a M.L. Ginther Grantor Trust; and (b) amends its Schedules and Statement of Financial Affairs to provide that the only property of the joint venture comprising Debtor's bankruptcy estate is its interests in or relating to the El Dorado Golf Club, Inc. and the real estate known as the "El Dorado Ranch" described in Debtor's existing Schedules as "undivided interest in approximately 2,033 acres of real property located in Harris County, Texas." It is further,

ORDERED that no other property, whether listed in the Debtor's existing Schedules or otherwise, is property of the Debtor's bankruptcy estate or subject to the automatic stay pursuant to 11 U.S.C. § 362. It is further,

ORDERED that the Debtor shall have the exclusive right to file a plan of reorganization up to and including September 9, 1998, and, if the Debtor files a plan within such exclusive period, the Debtor shall have the exclusive right to seek confirmation of a plan up to and including November 6, 1998. It is further,

ORDERED that the deadline for filing Proofs of Claim shall be extended to and expire on July 31, 1998. It is further,

ORDERED that a special meeting of creditors pursuant to 11 U.S.C. § 341 shall be July 15, 1998 at 1:30 p.m. at 515 Rusk, Room 3401, Houston, Texas 77002. It is further,

ORDERED that the Clerk of Court shall serve a copy of this Order on all creditors and parties in interest listed on the mailing matrix or who have file notices of appearance in this case.

Appendix A

SIGNED on June 24, 1998.

s/ William Greendyke
UNITED STATES BANKRUPTCY
JUDGE

APPROVED AS TO FORM:

s/ Barnet B. Skelton, Jr.
Barnet B. Skelton, Jr.
State Bar No. 18456400
Fed Adm. No. 6962
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(713) 659-8761 – Phone
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ATTORNEY FOR MOVANTS

David P. McClain, P.C.

s/ David P. McClain
David P. McClain
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ATTORNEY FOR THE GINTHER
TRUSTS, A TEXAS JOINT VENTURE

Appendix A

s/ Nancy Holley
Nancy Holley
State Bar No. 09875550
Office of the United States Trustee
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Houston, Texas 77002
(713) 718-4663 – Phone
(713) 718-4670 – Fax

ATTORNEY FOR THE UNITED STATES TRUSTEE

APPENDIX B — EXCERPTS FROM TRANSCRIPT DATED JANUARY 28, 2000; JUDGE GREENDYKE'S ORAL RULING ON MOTION TO SELL/AMENDED MOTION TO SELL/2ND AMENDED MOTION TO SELL (TRANSCRIPT, JAN. 28; 230-243)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 98-32663-H4-11
ADVERSARY NO. 99-3058-H4-ADV.

THE GINTHER TRUSTS,
A TEXAS JOINT VENTURE

v.

NOBLE C. GINTHER, JR., ET AL

THE COURT: Mr. McClain, I think the requirements of 363h have been met. And I think the record's also replete with evidence as to who owns the legal title to the property and who ought to be entitled to distributions, again, based upon the title report.

The — one of the big issues that Mr. Bowen raises is a question of debtor's ability to deal with the property and the equitable title of the folks who comprise the beneficiaries of the trusts that in turn compromise the joint venture. Again, I think that's water under the bridge. I think — you know, really, in effect he recognizes, if not in a binding way then in at least a candid form of argument way that this is a positive thing to occur with this property.

Appendix B

And this is a court of equity and all these folks have claims in some form, shape or fashion, even though the catalyst for all this Hyder-Rowan is at least severely handicapped, if not gone. If Hyder-Rowan were here we would certainly have the ability to do it and just because they've lost on appeal doesn't mean that he disappeared and we would certainly have the ability to deal with this property.

This Court's about making pragmatic decisions about when to sell something and make claims attach to the proceeds or let the debtor distribute on a pro rata or equitable basis based upon an equation reached between the claims amount and a much lesser amount of assets to distribute.

I don't think that Mr. Cox has been blithe about this. I don't think that he is being capricious or frivolous with regard to how he's dealing with this sale. I think he's being practical and realistic. I think he's dealt with — from what I can see and from my judgment of his demeanor, in good faith with how he's dealt with everybody. I think unquestionably, and I can just recall how they've dealt with me, Redstone's been in good faith and I think has dealt fairly with me and with everybody from what I can tell.

Mr. Cox has a fiduciary duty to me now. That's the one — I don't need to dig down three layers or two layers to find another fiduciary duty. I'm concerned more about the one that he's dealing with me with respect to.

In effect we created the debtor because a year ago there was a bunch of other different lawyers sitting at that table where you're sitting and they were wanting to kill the debtor

and tear up all that 2,000 acres and it wouldn't have gone to anybody who had a claim against the estate other than Hyder-Rowan, based upon what they had done.

I didn't agree with the way the case was filed and I tried to be reasonable about my analysis of what Mr. McClain was telling me and I didn't agree with everything he said but I did agree upon the one core argument. What I saw was different than what he was arguing I should see, and I saw a joint venture for not all the trust interests but just that interest that's represented by the 2,000 acres in the golf country club.

And that's why we're here. And from an equitable procedural standpoint I think that was something that was probably appealable way back then. And it should have been brought to our attention. I don't think it's fairly appealable with respect to this order, although you're free to do whatever you want to do with regard to what we're doing here.

I think inescapable from everything I've heard, from all the witnesses and I think it's apparent from watching the demeanor of the parties and looking at these ancient, almost twenty-year old court proceedings between the parties who are here today, I think the best thing for that 2,000 acres is to go ahead and clean it up by selling free and clear of all these claims and interests to somebody who will do something with it besides fight over it.

To me it's just going to cure litigation or potential for litigation — eliminate potential for litigation rather than enabling it to persist. Any claims that might be made with respect to the property or the debtor should be made in

connection with the case. Obviously the sale order will be a final order and anything we do in connection with the Chapter 11 case will be a final order.

I don't think that the order, the sale order and the findings we've made in connection with 362 — 363h or I ought to have any res judicata effect on the Fergus Ginther state law claims against Nucorp or Mr. Davis. To that extent — to the extent argued, not proving any breach of fiduciary duty claims that might exist after Judge Hoyt's order because of anything that might have occurred at the hand of Mr. Davis or Nucorp ought to be preserved. And no res judicata effect with regard to this order or these findings ought to enure to the benefit of Mr. Davis or Nucorp in connection with those prior orders that Judge Hoyt — prior relationship established by the agreements of the parties that Judge Hoyt dealt with in his order.

I think Judge Hoyt's order does say that Nucorp is the legal title owner and has complete authority to deal with this property in connection with its property rights, its legal rights that flowed from those prior bankruptcy cases. There's no doubt in my mind about that from looking at Judge Hoyt's order.

I don't make any finding of bad faith against Davis and Nucorp. I think for me to find affirmatively that they are in good faith and have dealt fairly with respect to all parties in connection with the fee arrangement would be something that would be used against Fergus Ginther.

Appendix B

I will find — you know, I see no evidence of bad faith. I see no evidence of unreasonableness with regard to the estate. So that's my focus is in light of the property, the parties who are making claims against the estate, and the parties who are making claims against the property, does all of this look right from an economic standpoint. And my economic barometer is going through the roof. This is the absolute best thing that can happen to this property. And a 350,000 or $700,000 commission, finder's fee or whatever it is in connection with this property in light of the amount of money involved I think is reasonable under the circumstances as far as the estate is concerned. Okay? So I don't have a problem with that.

I recognize how the deal has changed. I've recognized the fee split arrangement was originally 2 million, then 1 million, then something else and now it's gone way down. I think that's a further indication that the parties are responding to our lawyers and our situation in trying to make it be more reasonable. That makes me feel better. A million dollars looks a lot worse than $350,000 in terms of what's reasonable under the circumstances.

I think Mr. Cox's testimony that — and really probably Mr. Davis's testimony to the effect that we couldn't get hardly anything for an undivided 51 or 54 or 57 percent interest in this property is accurate. I don't know who would want to buy an undivided one-half interest in this property with 15 other co-owners. It just doesn't make any sense. So I think the only commercially reasonable thing to do with this piece of property is to sell it free and clear of all these interests.

Appendix B

I recognize you've made agreements with the TNRCC. You've alluded to me some — I know Bobbie Baylis [sp.ph.] is involved in this. I don't know what you want to do with her or her interest in this. I'm reckoning that you all will handle that. That's all a matter of our record, at least in the file.

The other property interests I want to see how you deal with those. You've already alluded to those earlier in argument. I'm going to want to see the order and how you treat those. Stone Mountain's in default and I think the oil and gas lease ought to be done away with. I think to the extent that the owners' interests, to that extent those bundle of rights that would center around the mineral estate are sufficient property interest to be sold to do away with whatever has been leased away to Stone Mountain, particularly in light of the default.

I'm trying to think what else I haven't touched upon. Let me look through my notes quickly.

In case it wasn't clear from my general finding with regard to 363h, I do agree partitioning in kind is impossible because of the variation in land and the great number of owners.

I recognize that the purchase price has changed or dropped in connection with reduction in the amount of land to be purchased, as well as the business reality of having to deal with Noble Ginther and perhaps the Davis fee arrangement. The — I still don't think that that ought to be something that's in effect held against Mr. Davis in

connection with the estate. I mean I — after hearing all this I can't imagine why Redstone hung in for so long. I mean it's amazing.

That's it. What is this? I've been reminded of the motion by Amber Ginther to intervene and the proposed order. I'm going to go ahead and sign it today based upon my findings and my calling for an order from the debtor approving the sale free and clear. And I'll allow the clerk to docket that.

How is it going to take to get me an order?

MS. COOK: We're arguing here, Your Honor.

MR. SPEAKER: We're arguing.

MS. COOK: We have one drafted and it's going to need to go to the title company. I would say — Gary thinks a week.

MR. McCLAIN: I would like to have it done this week.

MS. COOK: We'll try to get it sooner than that.

MR. McCLAIN: I mean not this week.

THE COURT: I'll just wait for you. That's your problem and not mine.

What I've read into the record's going to suffice for findings and conclusions. If anybody wants me to make additional conclusions or findings, to a limited basis you

might do it in the order. Obviously, some of the things I've said I want implemented in the order and I will look at it in the order. If I have a problem with what the order says that I don't feel like I can fairly fix on my own, we may call you all back for a hearing the date of entry of the order.

What your request was, Mr. Brown, I don't want to grant with regard to the order and allow you to do that by separate motion in connection with the main case motion to lift. Obviously —

MR. BROWN: I do want to be sure that the principle and interest —

THE COURT: Obviously, this order is going to deal with both the motion to sell and the judgment. Okay?

MR. McCLAIN: Well, actually, Your Honor, we were contemplating, I think, one or two orders.

MS. COOK: We can do it either way. I have draft —

THE COURT: I would do one.

MS. COOK: That's how I drafted it.

THE COURT: That would make it a lot easier if somebody decides to appeal.

MR. McCLAIN: We're going to do a final judgment and an order.

THE COURT: Yeah. Just have — and just put a line in that says a copy of this judgment should be docketed in the main case to represent disposition of main case motion so and so.

Mr. Hill?

MR. HILL: Your Honor, I'm sorry if I missed this in your ruling, but the only comment I heard was that you would look to see how they would treat the co-owners in the order that they presented to you. I would ask the Court for a ruling regarding the Nucorp request that the disbursement be made to Nucorp so that at least we're clear on that.

THE COURT: It should have been implicit. Absolutely.

MR. HILL: Okay. Thank you.

THE COURT: Absolutely. That's crystal clear from Judge Hoyt's order that you're entitled to distribution, notwithstanding the recitation I want in the order that the impact of the order and the disbursement to Nucorp has no res judicata effect on any state law rights that might be assertable by Fergus Ginther against Mr. Davis or Nucorp.

MR. HILL: Thank you.

MR. BROWN: Your Honor, I do want to make clear that the — and request that the order provide that the uncontested portion of principle and interest or if there's agreement as to attorney's fees on Tebear Investments' lien would be paid and disbursed at the closing.

THE COURT: I thought that was the agreement.

MR. BROWN: And that was the agreement we started this proceeding with, but I would ask that it be incorporated in the order.

MR. HIGGINS: I think that was also our agreement. The only thing we asked is if they would provide a calculation and we'll sign off on it.

MR. McCLAIN: And it's possible, Your Honor, that you're going to find that we may reach an agreement as to a date — as to a sum certain where he's willing to cap his claim.

MR. BROWN: I've made that offer.

MR. McCLAIN: He's made an offer.

MR. BROWN: We'd like to go and never see this case again.

MR. McCLAIN: The feeling is mutual, Your Honor.

THE COURT: Are you talking about Mr. Brown or you talking about the case?

MR. McCLAIN: I'm talking about both, Your Honor. I really am. But we may have a — we may have a sum certain with respect to that amount in the order.

MS. COOK: The other thing I can think of, Your Honor, is we will need to address the 363i rights in the final order which we've talked about. I think it'll need to reflect who the record owners are.

THE COURT: And we're going to go on the basis that — Exhibit #1, right? That's fine with me.

I want Mr. Bowen to see the order, okay?

MR. McCLAIN: We'll circulate them to —

THE COURT: And I would appreciate it if you'd sign off as to form, Mr. Bowen, so that you see what we're doing with regard to Fergus Ginther state law rights. I think I've been complete and have pretty much reserved everything that you wanted reserved and I just want you to see it.

Mr. Hill?

MR. BOWEN: I just want to make sure I do have — you didn't — I don't know if you intended to touch on this but I want a clarification as to whether or not we can go to state court in order to try to get the state court to take control of the funds. I understand this Court is not going to.

THE COURT: I have no desire to have a lawsuit between you or your client and Mr. Davis. And I don't even know who's got that bankruptcy case or if it's — Judge Hoyt's got it. So —

MR. SPEAKER: I hope it's over.

MR. BOWEN: It went of for — It's over. It was fourteen years. I heard it was fourteen years. But, no, I wanted to just —

THE COURT: I'll let you lawyer that but it doesn't belong here because this order says it goes to Hill.

MR. McCLAIN: Your Honor, I would like it clear — you know, that it wouldn't be looked kindly upon if he's going to try to enjoin my distribution or something like that. I mean without it going into escrow.

MR. BOWEN: Right. I don't mind — I don't want to — I want to pursue my rights in state court against the Nucorp funds, but I don't want to do anything that could be considered to be interfering in that regard with the order of this Court and the jurisdiction of this Court. I don't — I understand where I'm going and I want to go there. I just want to make it clear that if I go there and assert whatever I can try to assert in that forum with regards to the Nucorp-Davis proceeds —

THE COURT: My point is the sale is in good faith. The sale's a good deal. The buyer is in good faith. It's going to go through so you obstruct that, you'll be in big trouble.

MR. BOWEN: No, sir. No, sir. I will appeal it but I won't obstruct it unless somebody stays it.

THE COURT: Mr. Hill?

MR. HILL: I didn't have anything further.

MR. McCLAIN: Your Honor, if in light of that there is going to be an appeal, perhaps we should perhaps I should offer these maps as something more than just the demonstrative aids and take them home. And I could I offer those into the record as exhibits at this point and —

THE COURT: I think that's fine.

MR. BOWEN: No objection.

MR. McCLAIN: I would offer them as Exhibits — I believe it's —

THE COURT: Why don't you just mark them A and B.

MR. McCLAIN: A and B?

THE COURT: A is going to be the big plat and then the smaller map with the deleted portions of property will be B.

MR. McCLAIN: We'll take them down and deliver them to the Court.

THE COURT: Miss Bellville will take them right here. Just leave them on her blackboard and —

MR. McCLAIN: Leave them on her blackboard.

THE COURT: Anything else?

MR. SPEAKER: Nothing further, Your Honor.

THE COURT: All right. We stand adjourned till 9:30 Monday. Thank you all.

(These proceedings concluded at 4:51 p.m.)